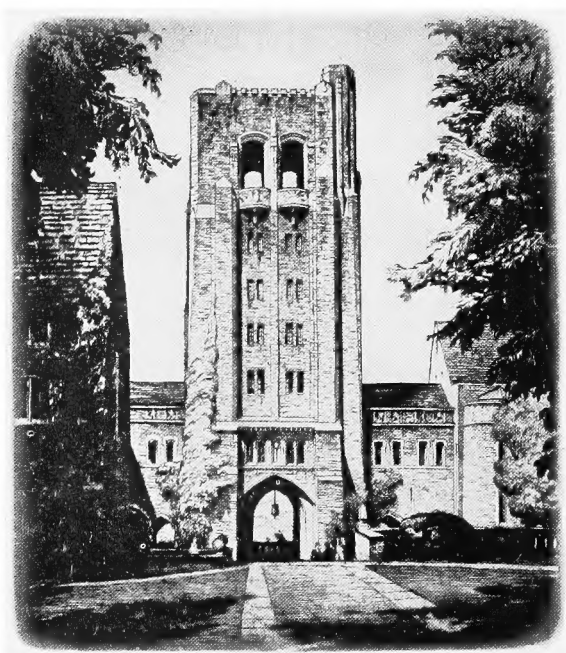


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ON THE LAW OF
EASEMENTS
IN CONTINUATION
OF THE AUTHOR'S TREATISE
ON THE
LAW OF REAL PROPERTY

BY
LEONARD A. JONES, A. B., LL. B. [HARV.]

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TO
THE HONORABLE JAMES TYNDALE MITCHELL
JUSTICE OF THE SUPREME COURT
OF PENNSYLVANIA
AS A TOKEN OF FRIENDSHIP FOR A HARVARD CLASSMATE
AND IN APPRECIATION OF THE ESTEEM IN WHICH HE IS HELD AS A
JURIST AND JUDGE
THIS WORK IS DEDICATED
BY THE AUTHOR

PREFACE.

In this volume I take up the consideration of those incorporeal hereditaments which are called Easements, or uses and profits in the land of another. It is a continuation of my work upon the Law of Real Property, and is written, as that was, with the intention of stating the law of the subject with such completeness as to make the treatise valuable to the courts and to practising lawyers. The subject is one that presents many difficult questions, and to such of these as seemed to be of practical importance I have given much attention; but have not sought out or dwelt upon those that seemed to be for the most part theoretical. In fact, all through the volume I have given my attention to those parts of the subject that are of general and every-day use, more fully than to others not of such practical importance. Thus, I have devoted seven chapters to the subject of Private Ways and one to Public Ways, embracing together about one-third of the volume, because rights of way are of greater practical importance than any other division of the subject of Easements.

I have cited a great number of cases, about five thousand, and believe that they will generally be found to fully support the propositions to which they are cited. It should, however, be kept in mind that the writer of a legal text-book often cites cases which are not decisions sustaining the statement in his text, but only contain dicta, or, perhaps, a discussion of the matter in hand, or a reference to it, without any expression of opinion by the court. A writer who undertakes to make a reasonably full citation of authorities would be considered much in fault if he merely cited those decisions which squarely meet and sustain his text.

PREFACE.

It is quite possible that I may hereafter write upon some other important divisions of the Law of Real Property; and if I do, the volumes will be published under specific titles, as a continuation, and not as an inseparable part of my work upon Real Property.

L. A. J.

Boston, January 1, 1898.

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PART I.

EASEMENTS IN GENERAL AND THEIR CREATION.

CHAPTER

- I. DEFINED AND DISTINGUISHED.**
- II. CREATED BY GRANT.**
- III. CREATED BY IMPLIED GRANT UPON SEVERANCE.**
- IV. CREATED BY PRESCRIPTION.**

PART I.

EASEMENTS IN GENERAL AND THEIR CREATION.

CHAPTER I.

EASEMENTS DEFINED AND DISTINGUISHED.

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|---|---|
| <p>I. In general, 1-17.</p> <p>II. Appurtenant to land, 18-32.</p> <p>III. In gross, 33-48.</p> | <p>IV. Profit à prendre, 49-62.</p> <p>V. License, 63-79.</p> |
|---|---|

I. *In General.*

1. An easement is a privilege without profit which one has for the benefit of his land in the land of another.¹ An easement has also been defined in more ample terms to be "a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement in or over the tenement of another person whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former."²

Again it is said to be "a right which one proprietor has to some

¹ Washb. Easem. 2; Goddard's Easem. 3 L. R. A. 783; Nellis v. Munson, 108 452; Hewlins v. Shippam, 5 B. & C. N. Y. 453, 459, 15 N. E. Rep. 739; Hills 221, 229; Wynn v. Garland, 19 Ark. 23, v. Miller, 3 Paige, 254, 257, 24 Am. 68 Am. Dec. 190; Johnson v. Lewis, 47 Dec. 218; Pierce v. Keator, 70 N. Y. Ark. 66, 71, 14 S. W. Rep. 466; Dubuque 419, 421, 26 Am. Rep. 612; Wolfe v. v. Maloney, 9 Iowa, 450, 74 Am. Dec. Frost, 4 Sandf. Ch. 72; Post v. Pearsall, 358; Karmuller v. Krotz, 18 Iowa, 352, 22 Wend. 425, 438; Jackson v. Trullin- 356, per Dillon, J.; Morrison v. Mar- ger, 9 Oreg. 393, 397; Big Mountain 444; Cook v. Chicago, B. & Q. R. Co., Imp. Co.'s Appeal, 54 Pa. St. 361.

² Goddard on Easem. 2; approved in 40 Iowa, 451; Ritger v. Parker, 8 Cush. Stevenson v. Wallace, 27 Gratt. 77, 87, 145, 147, 54 Am. Dec. 744; Greenwood and Tardy v. Creasy, 81 Va. 553, 556, 59 Lake & Port J. R. Co. v. New York & Am. Rep. 676; Ritger v. Parker, 8 G. L. R. Co., 134 N. Y. 435, 31 N. E. Cush. 145, 54 Am. Dec. 744, per Shaw, Rep. 874, 47 N. Y. St. 550; Huyck v. An- C. J.; Owen v. Field, 102 Mass. 90, 103, drews, 113 N. Y. 81, 20 N. E. Rep. 581, per Ames, J.

profit, benefit or lawful use, out of or over the estate of another proprietor.”

This latter definition is exceptional. Almost all the definitions exclude those privileges which include rights to profits out of the soil. These are called rights to profits *à prendre*, and are regarded as a peculiar species of easements, and are treated of under that title.

The essential qualities of easements as stated in almost the same terms by the courts in many cases, and by distinguished authors, are these: First, they are incorporeal; second, they are imposed on corporeal property; third, they confer no right to a participation in the profits arising from such property; fourth, they are imposed for the benefit of corporeal property; fifth, there must be two distinct tenements,—the dominant, to which the right belongs, and the servient, upon which the obligation rests.¹

2. An easement aside from an easement in gross can exist only as it is appurtenant to land.² It cannot exist unconnected with the land, to the enjoyment and occupation of which it is incident. A right in the land granted for the personal use and benefit of an individual is a personal privilege, which is called an easement in gross, as distinguished from the privilege usually termed an easement, which is a privilege incident to particular land. Whether a privilege is a personal right, or is appurtenant to some estate, and therefore an easement, is determined by a fair interpretation of the instrument creating it, aided, if necessary, by the situation of the property and the surrounding circumstances.³

3. The land in favor of which the privilege exists is called the dominant tenement, and that upon which the burden or servitude is imposed is called the servient tenement. Both have reference to the land, and not to the person, of its owner.⁴ It is essential to an easement that there should be both a dominant and servient estate.

¹ Washb. Easem. 3; Wolfe v. Frost, 4 Sandf. Ch. 72, 89; Pierce v. Keator, 70 N. Y. 419, 421, 26 Am. Rep. 612; Shirley v. Crabb, 138 Ind. 200, 203; Harrison v. Boring, 44 Tex. 255, 267.

² Ackroyd v. Smith, 10 C. B. 164; Wagner v. Hanna, 38 Cal. 116, 99 Am. Dec. 354; Peck v. Conway, 119 Mass. 546; Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676.

³ Peck v. Conway, 119 Mass. 546, per

Morton, J.; substantially in his language.

⁴ Mayo v. Newhoff, 47 N. J. Eq. 31, 19 Atl. Rep. 837; Pierce v. Keator, 70 N. Y. 419, 421; 26 Am. Rep. 612; Wolfe v. Frost, 4 Sandf. Ch. 72; Willoughby v. Lawrence, 116 Ill. 11, 16, 4 N. E. Rep. 356; Kieffer v. Imhoff, 26 Pa. St. 438; Wagner v. Hanna, 38 Cal. 111, 116, 99 Am. Dec. 354.

A privilege to use the land of another, which has no reference to the land of the person to whom the privilege is given, is not an easement.¹ It is as essential that an easement should be connected with a dominant tenement, as it is that there should be a tenement over which the right is exercised.²

But while, as a general rule, there must be a dominant estate to which an easement may appertain, and a servient estate upon which it is imposed, "there may be easements in gross, which are not appurtenant to any land, and which the owner may enjoy, although he does not own or possess a dominant estate or any land whatever."³

4. A right of exemption from paying toll to a turnpike company is not an easement. The right of the turnpike company to collect tolls, when this right is conferred upon it in consideration of its building the road, is itself an easement. The road belongs to the public and every one has the right to use it upon paying the tolls established by law. An exemption from such payment, conferred upon the owner of land through which the road is built, is not an easement, because there is no servient estate. Such person has the right to use the road as one of the public. This agreement with the turnpike company simply relieves him from the payment of tolls.⁴

5. It is not essential that the dominant and servient estates shall be contiguous, except that in the case of a right of way, it is said to be essential that one terminus of the way shall be in the dominant estate.⁵ Thus a pew in a church may be appurtenant to a house quite distant from the church.⁶ The owner of a spring in a village laid an aqueduct along the village street. By a deed, duly acknowledged and recorded, he granted to the owner of a house and land upon a street which intersected that on which the pipe was laid, the right of taking from the aqueduct through a half-inch pipe, water, sufficient for the use of the householder's family, or his heirs and assigns owning and occupying his land, "to have and to hold the said right and privilege forever." The owner of the spring

¹ Rangeley v. Midland R. Co., L. R., 3 Ch. App. 306, 310, per Lord Carnes; Wolfe v. Frost, 4 Sandf. Ch. 72; Dark v. Johnston, 55 Pa. St. 164; 93 Am. Dec. 732; Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. Rep. 20, 14 L. R. A. 300; Wagner v. Hanna, 38 Cal. 111, 116, 99 Am. Dec. 354.

² Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

³ Mayor of New York v. Law, 125 N. Y. 380, 392, 26 N. E. Rep. 471, per Earl, J.

⁴ Kellett v. Clayton, 99 Cal. 210, 33 Pac. Rep. 885; Wood v. Truckee Turnpike Co., 24 Cal. 474.

⁵ § 35.

⁶ § 11.

conveyed his interest, and his grantee cut off the householder's supply of water. In an action by him against the grantee, it was held that the right of the plaintiff to take the water was not personal or in gross, but was connected with his house-lot, and amounted to an easement, and would pass with the land to whomsoever that might come.¹

A dam or reservoir may be appurtenant to a mill though situated at a considerable distance therefrom.² The dam or reservoir is incident to the mill and necessary to its beneficial enjoyment. It passes with the mill upon a conveyance without special mention. "It is said this dam or easement," in the case just cited, "is too far distant to pass by a conveyance of the mill. But the idea and definition of an easement incident to real estate granted, is a privilege off and beyond the local boundaries of the land or tenement conveyed. There is always a dominant and a servient tenement. It is not necessary that they should be contiguous to each other. The proximity of the one to the other is of little comparative importance in determining the question whether the easement passes by a conveyance of the dominant tenement. It depends rather upon the nature, character and purpose of the easement, its relation to the subject matter of the grant, its accustomed use in connection with it, and its necessity to the value, and to the beneficial and convenient use of the premises granted. There is a necessary connection between the mill and the stream and fountain of water which supply it, and which had long been used in connection with it. The value of the mill depended mainly upon this privilege, so that without it the mill was almost worthless. The easement or privilege in question was necessary, if not indispensable, to the use of the mill, was of great value to the grantee, and of no value apparently to the grantor after he had parted with the mill. Under these circumstances it is clear that the easement passed with the mill."

A reservation of a half interest in a well with a right of way to it, is an easement appurtenant to other land of the grantor although the dominant and servient estates are not in contiguity, being separated by a highway. The right reserved is not a mere personal right or license for the benefit of the grantor alone, but is for the benefit of the grantor's estate and passes to his grantee.³

¹ Cady v. Springfield Water Works Co., 134 N. Y. 118, 31 N. E. Rep. 245; Phillips v. Rhodes, 7 Met. 322.

² Perrin v. Garfield, 37 Vt. 304, 312.
³ Witt v. Jefferson (Ky.), 18 S. W. Rep. 229.

6. An easement exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist upon its continuance, or to claim damages upon its abandonment.¹ Thus a canal company under legislative authority diverted for the purposes of the canal a considerable part of the water of a brook, the residue of the waters of the brook, much diminished in quantity, continuing to flow in its original channel. After the lapse of about half a century the canal was purchased by a railway company, and subsequently filled up and a cut made which restored the water to the brook. The bed of the stream, owing to the diminished scour of the water, had been filled up, so that it was insufficient to carry off the water coming down in extraordinary floods. Such a flood occurring, and the water overflowing and damaging the crops of one who owned land on the stream below the point where the water was diverted to the canal, and where the water was afterwards restored to it, this landowner brought an action against the railway company for damages; and it was held that he had no right of action, because no obligation was imposed upon the canal company or its grantee to continue the diversion. The enjoyment by the landowner of a relief from the water for many years gave him no legal right to a continuation of that relief. On the other hand, when the canal company ceased to use the water for the purposes authorized, the riparian owners below had a right to insist that the water should be allowed to flow in its natural course for their benefit. Chief Justice Cockburn delivering judgment said: "Now, it is of the essence of such an easement that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right, its exercise may be discontinued, if it becomes onerous, or ceases to be beneficial, to the party entitled. An easement like the present, while it subjects the owner of the servient tenement to disadvantage by taking from him the use of the water, for the watering of his cattle, the irrigation of his land, the turning of his mill, or other beneficial use to which water may be applied, may, on the other hand, no doubt, be attended incidentally with equal or greater advantage to him, as, for instance, by rendering him safe from the danger of inundation. But this will

¹ *Mason v. Shrewsbury & H. Ry. Co.*, L. R. 6 Q. B. 578, 585, 10 Eng. Rul. Cas. 22.

give him no right to insist on the exercise of the easement on the part of the dominant owner, if the latter finds it expedient to abandon his right. In like manner, where the easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire a right to have it discharged on to his land, if the dominant owner chooses to send the water elsewhere, or to apply it to another purpose.”¹

7. The law of easements and servitudes relates exclusively to land and has no application to chattels.² But the owner of a building disassociated in title from the land whereon it stands, may, when he sells part of it, reserve rights in the part sold, for the benefit of the part retained, which the law will maintain and protect.³

8. The owner in fee of land may impose upon it any burden however injurious or destructive, not inconsistent with his general right of ownership, if such burden is not in violation of public policy, and does not injuriously affect the rights or property of others.⁴ Anything that is for the advantage of the dominant owner, and to the disadvantage of the servient owner is an easement. Thus a right to the free passage of light and air over and through a street to and from the adjoining land is an easement.⁵ The right to discharge smoke and soot on the premises of another is an easement within the meaning of a statute enacted to prevent or regulate the acquisition of easements by prescription.⁶ The right to discharge in the air over another's land, cinders, ashes or noxious vapors may be acquired as an easement; and the exercise of this right in a public street, interrupting the free passage of light and air to and from the adjoining premises, constitutes the taking of the easement which an abutting owner has in the street.⁷ “Easements,” says Lord Herschell, “may be of various characters, and it is a fallacy to suppose that every easement must be brought within some particular class which has been recognized, such as the class

¹ *Mason v. Shrewsbury & H. Ry. Co.*, R. Co., 1 Hun, 507, 509, per Boardman, J.
L. R. 6 Q. B. 578, 587, 10 Eng. Rul. Cas. 22, 30, per Blackburn, J.

² *Mayo v. Newhoff*, 47 N. J. Eq. 31, 104 N. Y. 268, 10 N. E. Rep. 528.

³ *Mayo v. Newhoff*, 47 N. J. Eq. 31, 19 Atl. Rep. 837.

⁴ *Mayo v. Newhoff*, 47 N. J. Eq. 31, 19 Atl. Rep. 837.

⁵ *Churchill v. Burlington Water Co.*, (Iowa), 62 N. W. Rep. 646.

⁶ *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146.

relating to water-courses, or light or air or otherwise. If a right is granted by the owner of land to another person to enter and to do something on the grantor's land for the benefit of the land of that other person that *prima facie* is an easement. And I do not see any reason why there should not be a perfectly valid easement in this right to go upon the land of the owner of locks or sluices, and in times of flood raise those locks or sluices to let the water down for the benefit of the land of the person who exercises the right." ¹

9. In several States the various easements are enumerated by statute Law. In California, Montana, North Dakota, Oklahoma, South Dakota ² the following land burdens or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements. 1. The right of pasture; 2, The right of fishing; 3, The right of taking game; 4, The right of way; 5, The right of taking water, wood, minerals and other things; 6, The right of transacting business upon land; 7, The right of conducting lawful sports upon land; 8, The right of receiving air, light, or heat from or over, or discharging the same upon or over land; 9, The right of receiving water from or discharging the same upon land; 10, The right of flooding land; 11, The right of having water flow without diminution or disturbance of any kind; 12, The right of using a wall as a party-wall; 13, The right of receiving more than natural support from adjacent land or things affixed thereto; 14, The right of having the whole of a division fence maintained by a coterminous owner; 15, The right of having public conveyances stopped, or of stopping the same on land; 16, The right of a seat in church; 17, The right of burial.

The following land burdens or servitudes upon land, may be granted and held, though not attached to land: 1, The right to pasture, and of fishing and taking game; 2, The right of a seat in

¹ *Simpson v. Mayor of Godmanchester* [1896], 1 Ch. 214, 219. In this case the owners of a mill had for upwards of 200 years exercised an uninterrupted right to open in times of flood, certain river locks, and it was held that the present owner of the mill was entitled to the right as an easement, and that such easement would be presumed to have been granted in respect of the lands of the present

owner affected by the exercise of the right.

² **California:** Civ. Code, §§ 801-811.

Montana: Civ. Code 1895, § 1250-1260.

North Dakota: R. Codes 1895, §§ 3351-3361.

Oklahoma: Comp. Stats. 1893, §§ 3724-3734.

South Dakota: Comp. Laws, 1887, §§ 2760-2770.

church; 3, The right of burial; 4, The right of taking rents and tolls; 5, The right of way; 6, The right of taking water, wood, mineral, or other things.

The enumeration given above includes not only easements properly so called, but *profits à prendre* as well.

10. There are many easements besides the principal ones named in these statutes. There may be an easement of piling articles of merchandise in boxes and bales, of hoisting them into a building, and of swinging shutters over a passage way.¹ There may be an easement to pile logs and lumber upon land used as a mill yard for the accommodation of a saw-mill.²

A right of pasturage is an easement. Thus a reservation of the grass, herbage, feeding and pasturage creates an easement in the grantor to enter and depasture the granted land.³

A right of common pasturage is an easement either appurtenant or in gross.⁴

A right to take sea weed from a beach is a *profit à prendre* in the nature of an easement, which is either appurtenant or in gross according to the terms of the grant and the attendant circumstances.⁵ Some others of the easements named are of the species called *profits à prendre*.

The right to use the wall of a building as a sign space is an easement that carries with it the right of such access to the wall as is necessary to make the right of value. A contract for such use of the wall for a stipulated term is not a lease, and the use of the wall under the contract is not a possession under a lease.⁶

11. The right to use a pew in a church may be appurtenant to a house as an easement.⁷ In such case the general property in the pew is in some religious society, and the use of it only in the owner of the house. The right may be acquired by grant or prescription.

¹ Richardson v. Pond, 15 Gray, 387.

² Gurney v. Ford, 2 Allen, 576; Voorhees v. Burchard, 6 Lans. 176.

³ Rose v. Bunn, 21 N. Y. 275.

⁴ Thomas v. Marshfield, 10 Pick. 364; Livingston v. Ten Broeck, 16 Johns. 14, 25, 8 Am. Dec. 287.

⁵ Phillips v. Rhodes, 7 Met. 322.

⁶ R. J. Gunning Co. v. Cusack, 50 Ill. App. 290; Willoughby v. Lawrence, 116 Ill. 11, 56 Am. Rep. 758.

⁷ Phillips v. Halliday [1891], App. Cas. 228, per Lord Hershell; Harris v. Drewe, 2 Barn. & Ad. 164; Hinde v. Chorlton, L. R. 2 C. P. 104; Stocks v. Booth, 1 T. R. 428, 430, per Buller, J —; Walker v. Gunner, 1 Hagg. Const. 314, 319, 322 per Lord Stowell; Shaw v. Beveridge, 3 Hill, 26, 38 Am. Dec. 616.

The pewholder has an exclusive right to occupy his pew, and may maintain trespass against any one who disturbs him in this right. But he does not own the soil over which his pew is built; nor the space above it; for there may be other pews in a gallery above him.¹ His right is an easement only, being the right to use the pew for special purposes.²

A right of burial, when confined to a churchyard, as distinguished from a separate independent cemetery, although conveyed with the common formula of "heirs and assigns forever," must, it seems, stand upon the same footing as the right of public worship in a particular pew of the church. It is an easement in, and not a title to the freehold; and must be understood as granted and taken, subject to such changes as the altered circumstances of the congregation or the neighborhood may render necessary. Like the sale of a church pew, which gives the mere right to worship in the particular place while the church stands and is occupied for religious purposes, the sale of a church vault gives, it seems, the mere right of interment in the particular plat of ground, so long as that and the contiguous ground continues to be occupied as a church yard.³

12. There may be an easement of ventilation and courts of equity will protect it by injunction. The cellar of a public house was ventilated by means of a shaft cut through the rock into a dis-used well situated upon land belonging to the owner of the adjoining estate, the air from the cellar passing through the shaft and out at the top of the well. The cellar had been so ventilated for more than forty years, without interruption, and with the knowledge of the owner of the land upon which the well was situated. It was held that an easement of the free passage of air from the cellar had been acquired and that a lost grant of the right ought to be inferred.⁴

13. An easement is not a right to the soil of the land or to any corporeal interest in it. Thus a right of way is a right to the reasonable enjoyment of the land in which the right exists, as a road or way. It is not a right to use the land for any other purpose, nor is it a right to use every square inch of the surface of the land for that purpose. An easement in a carriage-road forty feet wide is not

¹Gay v. Baker, 17 Mass. 435, 9 Am. Dec. 159; Jackson v. Rounseville, 5 Met. 127; Shaw v. Beveridge, 3 Hill, 26, 38 Am. Dec. 616.

²Hinde v. Chorlton, L. R. 2 C. P. 104.

³Richards v. Northwest Prot. Dutch Church, 32 Barb. 42.

⁴Bass v. Gregory, 25 Q. B. D. 481.

interfered with by the building of a portico, the columns of which project two feet into the road, there being ample space left for the convenient enjoyment of the easement conveyed to the grantee. "The road is not his, the exclusive use of it is not granted to him; what was granted to him was an easement and nothing more. The soil has not been conveyed to him, but he has the right to use a road forty feet wide. If the soil of the road had been granted to the plaintiff, any interference with it would have been actionable; but where an easement over a road is granted, only the reasonable enjoyment of the road passes; this seems to be the result of the authorities as to the difference between the right to the soil and to an easement over it."¹

A conveyance of the "free use of the undivided half part of a wagon way" described, "to be used only for passing in and out at all proper times, but without unnecessary delay or destruction to the said passageway, thereby causing annoyance and damage" to the grantor, with a habendum to the grantee, his heirs and assigns, with the usual covenants of warranty conveys only a right of way or easement.²

A conveyance of a saw-mill "with the privilege of occupying land in front of said mill and below the same, sufficient for a timber yard, adjacent to said saw-mill" creates only an easement in the mill-yard.³

14. A grant of the exclusive use of land is not an easement, for such a grant excludes the grantor, and is in practical effect a grant of the soil itself.⁴

A grant of the exclusive use of a gateway is a grant not merely of a right of way through the gateway but to the use of the gateway for all lawful purposes.⁵

But this rule does not apply where the grant is exclusive of the use of some particular right in the land. The owner of land on which there were springs, sold and conveyed to another and his heirs "the whole use" of the springs, with the right of laying an aqueduct

¹ Clifford v. Hoare, 43 L. J. Com. Pleas, 225, 230, per Brett, J.; L. R. 9 C. P. 362.

² Harris v. Johnson, 31 N. J. Eq. 174.

³ Cross v. Pike, 59 Vt. 324, 10 Atl. Rep. 526, and see Gurney v. Ford, 2 Allen, 576.

⁴ Buszard v. Capel, 8 B. & C. 141, Lord Tenterden, C. J., saying, "it is difficult to understand how the exclusive use could be demised and land not."

⁵ Reilly v. Booth, 44 Ch. D. 12.

to supply water to a town, and also the right to enter upon the land for the purpose of constructing and repairing the aqueduct, the grantee covenanting to supply the grantor's house with water. It was also provided that the indenture should be void if water should not be delivered in the aqueduct for the space of a year at one time. It was held that no title to the soil was conveyed, but only an easement in it. The court said there was no more reason for saying that the fee simple of the soil, under and around the springs was vested by the terms of the indenture than for saying that the soil under and inclosing the aqueduct was so vested. "The use of the springs," taken in connection with the rest of the instrument, could only mean the right to appropriate the water, wholly or in part, by conducting it by means of an aqueduct to the places where it is to be distributed.¹

A vote of the proprietors of a township "that one hundred acres of the poorest land on Millstone hill be left common for the use of the town for building stones," does not pass the land itself, but only a limited use of it for a particular purpose, or an easement for the inhabitants of the town.²

15. A right to take minerals from the land of another is an incorporeal privilege; but a right to all the coal in certain lands or to a certain vein of coal is a right to a part of the land, and cannot be the subject of a claim by prescription as an easement.³ A reservation of the exclusive right of mining in the granted land may be held to operate as an exception from the grant of the property in the mines;⁴ but a reservation of the right of mining a certain quantity of ore annually at a certain duty per ton does not save to the grantor any interest in the land, but is a mere personal privilege.⁵

¹ Owen v. Field, 102 Mass. 90.

² Worcester v. Green, 2 Pick. 425.

³ Wilkinson v. Proud, 11 M. & W. 33; Chetham v. Williamson, 4 East, 469, 476; Doe v. Wood, 2 B. & Ald. 724; Carnahan v. Brown, 60 Pa. St. 23; Caldwell v. Fulton, 31 Pa. St. 475, 72 Am. Dec. 760; Caldwell v. Copeland, 37 Pa. St. 427, 78 Am. Dec. 436; Gloninger v. Franklin Coal Co., 55 Pa. St. 9, 93 Am. Dec. 720; Barksdale v. Parker, 87 Va. 141, 12 S. E. Rep. 344; Lee v. Bum-

gardner, 86 Va. 315; 10 S. E. Rep. 3, and see Grubb v. Bayard, 2 Wall. Jr. 81; Farnum v. Platt, 8 Pick. 339, 19 Am. Dec. 330.

⁴ Benson v. Miners' Bank, 20 Pa. St. 370; Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290.

⁵ Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290, 322; Grove v. Hodges, 55 Pa. St. 504; Johnstone Iron Co. v. Cambria Iron Co., 32 Pa. St. 241, 72 Am. Dec. 783.

An agreement in a deed conveying twenty-two acres of land that the grantee should have the right and privilege to take all the iron ore he found upon the grantor's remaining land, which was a large tract, upon the payment of a certain price per ton for the ore taken, was held not to create an easement appurtenant to the land conveyed, but to be a distinct and independent covenant having no relation to the land conveyed; and, therefore, that the right did not pass as appurtenant to such land upon a subsequent sale of it under an execution.¹

16. A perpetual easement appurtenant to an estate in fee is a freehold interest, and a suit to recover the enjoyment of it is a suit involving a freehold.² An easement may be held in fee, "nor is there anything novel or strange in the doctrine that there may be a fee in an easement, for an easement is an estate in land. All easements are estates in land. A fee may exist in all estates in land; therefore, a fee may exist in an easement."³

An easement is an interest in land "in fee or of a freehold estate" within the meaning of the statute declaring that a conveyance of such an estate shall be acknowledged or attested by a witness; and that a grant not so attested or acknowledged shall not take effect as against a purchaser or encumbrancer. Under such a statute the fact that a subsequent purchaser had notice at the time of his purchase of the conveyance of the easement by a deed not attested or acknowledged does not affect his right to treat the conveyance as inoperative.⁴ It is an interest in land under a statute which provides that a petition seeking to acquire lands for a right of way for a railroad must set out the parties who have an interest in the land, so that those who have easements only must be made parties.⁵

A water right acquired by a user of water under a contract with an irrigation company, being an easement in the ditch, is an incorporeal hereditament descendible by inheritance to the owner and heirs, and constitutes a freehold estate.⁶

¹ Grubb v. Guilford, 4 Watts. 223, 28 Am. Dec. 700.

² Tinker v. Forbes, 136 Ill. 221, 26 N. E. Rep. 503; Oswald v. Wolf, 126 Ill. 542, 19 N. E. Rep. 28, 25 Ill. App. 501.

³ Branson v. Studabaker, 133 Ind. 147, 164, 33 N. E. Rep. 98.

⁴ Nellis v. Munson, 108 N. Y. 453, 15 N. E. Rep. 739, reversing 24 Hun, 575.

⁵ In re Niagara Falls & W. R. Co., 48 Hun, 616, 15 N. Y. St. 546.

⁶ Wyatt v. Larimer & W. Irrigation Co., 18 Colo. 298, 33 Pac. Rep. 144.

17. An easement constitutes property, of which its owner cannot lawfully be deprived without his consent, and of which the State cannot deprive him under the right of eminent domain without requiring compensation to be made therefor.¹ Thus an owner of land abutting upon a public street has an easement in the bed of the street, which entitles him to have it kept open and continued as a public street for the benefit of his property. This easement constitutes private property of which he cannot be deprived without compensation.²

A corporation taking property under the right of eminent domain should obtain a condemnation of easements appurtenant to land as well as of the land itself; and if easements alone are interfered with, there should be a condemnation of these.³

II. *Appurtenant to Land.*

18. An easement is appurtenant when it is for the benefit of the grantee's estate, and in that case it passes with the estate to all subsequent grantees.⁴ It is an inheritable estate and passes with the grantee's estate to his heirs and to the heirs of subsequent grantees dying possessed of the tenement to which the easement is appurtenant.

The principal thing to which another is appurtenant must be a thing more worthy and of perpetual continuance.⁵ "It follows that things in their nature equal, and of like character and grade, can never be appurtenant to each other, for the common as well as the legal meaning of the word implies inferiority and dependence, so that a water ditch could never become appurtenant to another

¹ *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528; *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146.

² *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146.

³ *Long Island R. Co. v. Garvey*, 42 N. Y. Supp. 155.

⁴ *Ackroyd v. Smith*, 10 C. B. 164; *Bailey v. Stephens*, 12 C. B. N. S. 91; *Hopper v. Barnes*, 113 Cal. 636, 45 Pac. Rep. 874; *Dennis v. Wilson*, 107 Mass. 591; *Underwood v. Carney*, 1 Cush. 285; *Boland v. St. John's Schools*, 163

Mass. 229; *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. Rep. 791; *Borst v. Empie*, 5 N. Y. 33; *Robert v. Thompson*, 16 Misc. (N. Y.) 638, 40 N. Y. Supp. 754; *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612; *Boatman v. Lasley*, 23 Ohio St. 614; *Metzger v. Holwick (Ohio)*, 31 W. L. Bul. 241; *Kuecken v. Voltz*, 110 Ill. 264; *Louisville & N. R. Co. v. Koelle*, 104 Ill. 455; *Moore v. Crose*, 43 Ind. 30; *Spensley v. Valentine*, 34 Wis. 154.

⁵ *Co. Litt.* 121 *b*, 122 *a*.

ditch of like character, and pass as an incident thereto, for the same reason that one farm will not pass as an appurtenance to another.”¹

19. A right of way is appurtenant to the land of the grantee if so in fact, although not declared to be so in the deed.² If the way leads to the grantee’s land and is useless except for use in connection with it, and both before and after the grant was used solely for access to such land, it is appurtenant to it. Though the way be granted by separate deed to one and “his heirs and assigns forever” it sufficiently appears that the way was intended to be appurtenant to the grantee’s adjoining land, when such intent is in accord with all the attendant circumstances.

A granted right of way which leads to the grantee’s land confers an easement appurtenant to such land and not merely a personal right.³ It is not essential that the grant of a way should be made by the same deed by which the land is conveyed in order to make the way appurtenant to such land; nor is it essential that the way be declared by the deed conveying it as appurtenant to the grantee’s land. Thus where one conveyed certain land by metes and bounds without including any right of way, and upon the same day conveyed to the grantee “his heirs and assigns, and tenants and occupiers,” a right of way over a strip of land adjoining the land already conveyed to him, it was held that the way was appurtenant to such land.⁴

Under an entry in a public land office of a portion of the public lands occupied as a town site, the occupant of a lot, in a town which had been surveyed and platted into streets, alleys, blocks and lots, continues to possess after such entry the same right of way over an adjoining alley which he had previously possessed as appurtenant to his lot.⁵

20. Only incorporeal rights pass as appurtenant to land or under the description of “appurtenances.” Land cannot pass as appurtenant, nor can the actual and exclusive possession of land

¹ *Donnell v. Humphreys*, 1 Mont. 518, 525, per Wade, C. J.

² *Hopper v. Barnes*, 113 Cal. 636, 45 Pac. Rep. 874; and see *Dennis v. Wilson*, 107 Mass. 591; *Huttemeier v. Albro*, 18 N. Y. 48.

³ *Randall v. Chase*, 133 Mass. 210; *Underwood v. Carney*, 1 Cush. 285;

Smith v. Worn, 93 Cal. 206, 28 Pac. Rep. 944; *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338.

⁴ *Moll v. McCauley*, 83 Iowa 677, 50 N. W. Rep. 216.

⁵ *Ashley v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308.

pass as appurtenant, for such possession does not differ in effect from a title in fee.¹ Lord Coke states the rule saying: "A thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal."² By a grant of a mill with its appurtenances, the soil of a way, immemorially used for the purpose of access to the mill from a highway does not pass.³

The Supreme Court of the United States holding that the soil and freehold of streets would not pass as appurtenances to land adjacent to such streets when taken by the United States by right of eminent domain for the purpose of a navy yard, though the soil and freehold of the streets belonged to the owner of the land taken, say: "A mere easement may, without express words, pass as an incident to the principal object of the grant; but it would be absurd to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries."⁴

21. A conveyance of a mill or mill site carries as a necessary incident to the grant the water privileges necessary for its use.⁵ By the grant of a house the curtilage and garden belonging to it pass with it as part of it. In the one case the water privilege, and in the other the curtilage passes not as appurtenant or incident to the thing granted but as parcel of the thing itself.⁶ "This is because, in the absence of anything to show the contrary, the grantor

¹ Harris v. Elliott, 10 Pet. 25, 54; Investment Co. v. Ohio & N. W. Ry. Co., 41 Fed. Rep. 378; Griffiths v. Morrison, 106 N. Y. 165, 12 N. E. Rep. 580; Jackson v. Hathaway, 15 Johns 447, 8 Am. Dec. 263; Leonard v. White, 7 Mass. 6, 5 Am. Dec. 19; Donnell v. Humphreys, 1 Mont. 518, 525.

² 1 Co. Litt. 121 b.

³ Leonard v. White, 7 Mass. 6, 5 Am. Dec. 19.

⁴ Harris v. Elliott, 10 Pet. 25, 54.

⁵ Jones on Real Property, §§ 1652-1656; Preble v. Reed, 17 Me. 169; Green v. Collins, 86 N. Y. 246, 253, 40 Am. Rep. 531, per Miller, J.; Voorhees v. Burchard, 55 N. Y. 98; Comstock v. Johnson, 46 N. Y. 615; McMillan v. Lauer, 24 N. Y. Supp. 951; Huttemeier v. Albrow, 18 N. Y. 48; Oakley v. Stanley,

5 Wend. 523; Burr v. Mills, 21 Wend. 290; Sloat v. McDougal, 9 N. Y. Supp. 631; Branson v. Studabaker, 133 Ind. 147, 165, 33 N. E. Rep. 98; Blaine v. Chambers, 1 Serg. & R. 169; Perrin v. Garfield, 37 Vt. 304, 312. In this case the pond upon which the mill was dependent for water was about a mile from the mill; but it was held that the easement passed with the mill notwithstanding its distance from the mill.

⁶ Sheets v. Selden, 2 Wall. 177; Bonelli v. Blakemore, 66 Miss. 136, 5 So. Rep. 228; Johnson v. Rayner, 6 Gray, 107; Branson v. Studabaker, 133 Ind. 147, 165, 33 N. E. Rep. 98; Kenworthy v. Tullis, 3 Ind. 96; Morrison v. King, 62 Ill. 30; Cook v. Whiting, 16 Ill. 480.

will be presumed to have so intended; but if in the instrument he negatives such an intention, the rule does not apply." Thus, where the owner of a mill and pond conveyed the mill lot, describing it by metes and bounds, excluding the pond, but giving the grantee the right to draw water through a six-inch pipe so long as the pond should be continued, and on the same day leased to the grantee for the term of twenty years at a stipulated rent all the water of the pond, subject to certain reservations, "the two instruments taken together," say the court, "show plainly that the grantor did not intend to give the plaintiff a right to have the pond permanently maintained. The right expressly given to draw water through the six-inch pipe was limited to the time that the pond should be continued, thus implying that the grantor might at any time discontinue it. But as a part of the bargain, the grantor was willing, by the lease, to give the grantee a right to use the pond for twenty years. At the expiration of that time the plaintiff's rights in it would cease if it should be discontinued, and would be limited to the flow through the six-inch pipe if it should be maintained." ¹

But if the owner of a mill and dam sells the land flowed by the dam, making no reservation of the right to continue to flow the land, he cannot set up an implied reservation of the right of flowage. He loses the right to flow such land. ² "A man makes a lane across one farm to another which he is accustomed to use as a way; he then conveys the former, without reserving a right of way; it is clearly gone. A man cannot, after he has absolutely conveyed away his land, still retain the use of it for any purpose without an express reservation. The flowing or the way are but modes of use, and a grantor might as well claim to plough and crop his land." ³

22. An easement which by grant, reservation or prescription is appurtenant to land is not a mere privilege to be enjoyed by the person to whom it is granted or by whom it is reserved. It passes by a deed of such person to his grantee and follows the land without any mention whatever. ⁴

¹ Washburn & Moen Co. v. Salisbury, 152 Mass. 346, 352, 25 N. E. Rep. 724, per Knowlton, J.

² Preble v. Reed, 17 Me. 169; Burr v. Mills, 21 Wend. 290.

³ Burr v. Mills, 21 Wend. 290, 292, per Cowen, J.

⁴ United States v. Appleton, 1 Sumn. 492, 503, per Story, J.; Hazard v. Robinson, 3 Mason, 272, 279.

California: Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409.

Illinois: Chicago, Santa Fe & Cal. R. Co. v. Ward, 128 Ill. 349, 18 N. E. Rep.

23. The term "appurtenances" is an apt one for passing an easement, such as a right of way,¹ but it is not essential to the

828, 21 N. E. Rep. 562; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. Rep. 503; *Kuecken v. Voltz*, 110 Ill. 264, 268; *Morrison v. King*, 62 Ill. 30; *Kuhlman v. Hecht*, 77 Ill. 570; *Oswald v. Wolf*, 126 Ill. 542, 19 N. E. Rep. 28.

Indiana: *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. Rep. 109; *Ross v. Thompson*, 78 Ind. 90; *Robinson v. Thraillkill*, 110 Ind. 117, 10 N. E. Rep. 647; *Davidson v. Nicholson*, 59 Ind. 411.

Iowa: *Karmuller v. Krotz*, 18 Iowa, 352; *Wetherell v. Brobst*, 23 Iowa, 586; *Moll v. McCauley*, 83 Iowa, 677, 50 N. W. Rep. 216.

Louisiana: *Bruning v. New Orleans Canal Co.*, 12 La. Ann. 541.

Maine: *Cole v. Bradbury*, 86 Me. 380, 29 Atl. Rep. 1097; *Dority v. Dunning*, 78 Me. 381; *Herrick v. Marshall*, 66 Me. 435.

Maryland: *Barry v. Eldavich (Md.)*, 35 Atl. Rep. 170.

Massachusetts: *Brown v. Thissell*, 6 Cush. 254; *French v. Morris*, 101 Mass. 68; *Jones v. Adams*, 162 Mass. 224, 38 N. E. Rep. 437; *Hollenbeck v. McDonald*, 112 Mass. 247; *Barnes v. Lloyd*, 112 Mass. 224; *Norcross v. James*, 140 Mass. 188, 2 N. E. Rep. 946; *Hogan v. Barry*, 143 Mass. 538, 10 N. E. Rep. 253; *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. Rep. 134; *Underwood v. Carney*, 1 Cush. 285; *Ritger v. Parker*, 8 Cush. 145; *Philbrick v. Ewing*, 97 Mass. 133; *Oliver v. Dickinson*, 100 Mass. 114; *Parker v. Bennett*, 11 Allen, 388, *Pettingill v. Porter*, 8 Allen, 1, 85 Am. Dec. 671; *Kent v. Waite*, 10 Pick. 138, 141.

Michigan: *Walz v. Walz*, 101 Mich. 167, 59 N. W. Rep. 431; *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. Rep. 791.

Missouri: *Stilwell v. St. Louis & H. Ry. Co.*, 39 Mo. App. 221.

Montana: *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. Rep. 339; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. Rep. 571; *Donnell v. Humphreys* 1 Mont. 518.

New Hampshire: *Spaulding v. Abbot*, 55 N. H. 423; *Seavey v. Jones*, 43 N. H. 441, 443.

New Jersey: *Brakely v. Sharp*, 9 N. J. Eq. 9.

New York: *Cady v. Springville Water Works Co.*, 10 N. Y. Supp. 570; *Huttemeier v. Albro*, 18 N. Y. 48; *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218; *Newman v. Nellis*, 97 N. Y. 285; *Valentine v. Schreiber*, 3 N. Y. App. D. 235, 73 N. Y. St. 838, 38 N. Y. Supp. 417; *Wells v. Tolman*, 34 N. Y. Supp. 840.

Ohio: *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. Rep. 717; *Boatman v. Lasley*, 23 Ohio St. 614; *Morgan v. Mason*, 20 Ohio, 401, 55 Am. Dec. 464; *Meek v. Breckenridge*, 29 Ohio St. 642.

Oregon: *Coventon v. Seufert*, 23 Oreg. 548, 32 Pac. Rep. 508; *Simmons v. Winters*, 21 Oreg. 35, 44, 27 Pac. Rep. 7.

Pennsylvania: *Manderbach v. Orphan's Home*, 109 Pa. St. 231, 2 Atl. Rep. 422.

Rhode Island: *Cadwalader v. Bailey*, 17 R. I. 495; 23 Atl. Rep. 20, 14 L. R. A. 300.

South Carolina: *Whaley v. Stevens*, 27 S. C. 549, 4 S. E. Rep. 145, 21 S. C. 221, 223.

¹ *Colburn v. Marsh*, 68 Hun, 269, 22 N. Y. Supp. 990; *Huttemeier v. Albro*, 18 N. Y. 48; *Newman v. Nellis*, 97 N. Y. 285; *Mayor of New York v. Law*, 125 N. Y. 380, 392, 26 N. E. Rep. 471; *Foote v. Manhattan R. Co.*, 58 Hun,

478, 12 N. Y. Supp. 516; *Simmons v. Winters*, 21 Oreg. 35, 44, 27 Pac. Rep. 7; *Valentine v. Schreiber*, 3 N. Y. App. D. 235, 73 N. Y. St. 838, 38 N. Y. Supp. 417.

passing of an existing easement, which is in fact appurtenant to the land conveyed. But when an easement, although not originally belonging to an estate, has become appurtenant to it, either by grant or prescription, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not, and whether the word "appurtenances" be mentioned or not, although it may not be necessary to the enjoyment of the estate by the grantee.¹

24. The word "appurtenance" conveys only what is legally appurtenant to the land in the hands of the grantor.² It does not convey an easement in the land of another, which, not having ripened into a legal right, has not become legally attached to the premises conveyed, unless accompanied by proper words describing it, and showing the intention of the grantor to pass it. "Nothing is more clear than that under the word 'appurtenances,' according

Vermont: Coolidge v. Hager, 43 Vt. 9, 5 Am. Rep. 256.

Virginia: Long v. Weller, 29 Gratt. 347; Linkenhoker v. Graybill, 80 Va. 835, 839; French v. Williams, 82 Va. 462.

Wisconsin: Mabie v. Matteson, 17 Wis. 1.

In **California, Montana, North Dakota and South Dakota** a transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time

when the transfer was agreed upon or completed. Cal. Civ. Code, § 1104; Mont. Civ. Code, 1895, § 1510; N. Dak. R. Codes, 1895, § 3538; So. Dak. Comp. Laws, 1887, § 3248.

In **Idaho** a transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed. R. S. 1887, § 2926, 860.

¹ United States v. Appleton, 1 Sumn. 492, 502; Alexander v. Tolleston Club, 110 Ill. 65; Karmuller v. Krotz, 18 Iowa, 352; Dority v. Dunning, 78 Me. 381, 6 Atl. Rep. 6; Cole v. Bradbury, 86 Me. 380, 29 Atl. Rep. 1097, per Waterhouse, J.; Barry v. Edlavitch (Md.) 35 Atl. Rep. 170; Kent v. Waite, 10 Pick. 138; Ritger v. Parker, 8 Cush. 145, 148, 54 Am. Dec. 744, per Shaw, C. J.; Atkins v. Bordman, 2 Met. 457, 467, 37 Am. Dec. 100; Morgan v.

Mason, 20 Ohio, 401, 55 Am. Dec. 464; Shields v. Titus, 46 Ohio St. 528, 22 N. E. Rep. 717.

² Harris v. Elliott, 10 Pet. 25, 54; Investment Co. v. Ohio & N. W. Ry. Co., 41 Fed. Rep. 378; Cole v. Bradbury, 86 Me. 380, 29 Atl. Rep. 1097, Oliver v. Hook, 47 Md. 301; Spaulding v. Abbot, 55 N. H. 423; Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531; Swazey v. Brooks, 34 Vt. 451; Ward v. Farwell, 6 Colo. 66.

to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass. If the grantor wishes to revive or create such a right he must do it by express words, or introduce the terms 'therewith used and enjoyed,' in which case easements existing in point of fact, though not existing in point of law, would be transferred to the grantee."¹

Thus a conveyance of land with buildings which are supplied with water from a spring on the land of another, without any mention of the easement, which had not at the time ripened into a legal right so as to have become attached to the premises, does not convey the easement though the word "appurtenances" is used in the habendum.²

Where there has been a dominant and servient tenement, and the ownership of such tenements has been unified, the easement becomes merged and extinguished. When the ownership is again severed, the easement does not revive and pass by a conveyance of the dominant tenement though the word "appurtenances" is used.³

25. A right of easement does not pass as appurtenant without mention unless it is an existing easement actually appurtenant by use and enjoyment at the time of the conveyance. It must actually belong to the estate conveyed in order to pass by implication.⁴ If at the time of the conveyance the existence of the easement has been suspended it cannot pass as appurtenant to the land.⁵

Where, at the time of the conveyance of a house and land, water was supplied to the house through a pipe laid under an oral license across the land of a third person to a highway, where it joined a pipe leading from the main pipe of an aqueduct company, it was held that no easement to maintain the pipes across the land of such third person passed by the deed. This right did not belong to the tenement conveyed, and the grantor had no power to convey it as an easement appurtenant. The right at any rate would not pass by implication.⁶

¹ *Plant v. James*, 5 Barn. & Ad. 791, 794, per Lord Denman.

² *Spaulding v. Abbot*, 55 N. H. 423.

³ *Fritz v. Tompkins*, 41 N. Y. Supp. 985; *Parsons v. Johnson*, 68 N. Y. 62.

⁴ *Philbrick v. Ewing*, 97 Mass. 133; *Winslow v. King*, 14 Gray 321; *Parker v. Bennett*, 101 Mass. 388; *Whiting v. Gaylord*, 66 Conn. 337; *Manning v.*

Smith, 6 Conn. 289; *Miller v. Scofield*, 12 Conn. 335, 343; *Williams v. Wadsworth*, 51 Conn. 277; *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490; *Barker v. Clark*, 4 N. H. 380, 17 Am. Dec. 428; *Spaulding v. Abbot*, 55 N. H. 423.

⁵ *Mussey v. Union Wharf*, 41 Me. 34.

⁶ *Philbrick v. Ewing*, 97 Mass. 133.

26. An easement in the grantor's other land will pass as appurtenant to land conveyed if the deed shows an intention that it shall pass, though it is not legally attached to the land conveyed and is not necessary for its enjoyment. Buildings on several adjoining lots covered the entire fronts of the lots, but left a space in the rear of each. The ground floors were for business purposes, and the floors above were flats. The space in the rear of the buildings was used by the tenants of the flats as an alleyway in carrying in supplies of various kinds and carrying out ashes and garbage, which could have been done through the front of the buildings only with great difficulty. The owner of the buildings leased them "together with all * * * lanes, alleyways, * * * and advantages to the said grounds belonging or in anywise appertaining." It was held that the lease to the lessee created a right of way over the rear of the lots in favor of each of the separate lots, and that such easement could not be released by the lessee. The easement created was not an easement in gross or a personal privilege granted to the lessee which he could release without the consent of the lessor who was a party to its creation, and whose interest in the continuance of such easement is manifest under the terms of said leases.¹

27. An easement acquired by prescription passes by a subsequent conveyance as appurtenant to the land for the benefit of which it has been used.²

Where an easement in a mill yard adjacent to a saw-mill has been acquired by prescription, and the owner conveys the mill with its appurtenances, evidence of the intention of the parties to the conveyance that the grantee should not acquire the easement cannot prevail over the rights of the grantee as determined by the deed.³

28. An appurtenant easement cannot be conveyed by the party entitled to it separate from the land to which it is appurtenant. It can be conveyed only by a conveyance of such land. It inheres in the land and cannot exist separate from it.⁴ It cannot be converted into an easement in gross.⁵

¹ Robert v. Thompson, 40 N. Y. Supp. 754; Hills v. Miller, 3 Paige, 254, 24 Am. Dec. 218; Huttemeier v. Albro, 18 N. Y. 48; Cox v. James, 45 N. Y. 557. v. Rhodes, 7 Met. 322; Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. Rep. 20, 14 L. R. A. 300.

² Voorhees v. Burchard, 6 Lans. 176. ³ Ackroyd v. Smith, 10 C. & B. 164, 187; Moore v. Crose, 43 Ind. 30; Boat-

⁴ Voorhees v. Burchard, 6 Lans. 176. man v. Lasley, 23 Ohio St. 614; Tini-
⁵ Moore v. Crose, 43 Ind. 30; Hankey cum Fishing Co. v. Carter, 61 Pa. St. v. Clark, 110 Mass. 262, 265; Phillips 21, 100 Am. Dec. 597.

A permanent easement acquired by a tenant, as appurtenant to the demised land, enures to the benefit of the landlord, at the expiration of the tenancy.¹

29. When an easement passes by implication as appurtenant to land conveyed, it is upon the ground that it is a valuable adjunct to the land, and not because it is necessary to the beneficial use of that land.² A right of way passes with the land though it is not strictly necessary to the enjoyment of the granted estate by the purchaser. Thus, where one having land fronting upon a public street purchases land in the rear of his land, which at the time had appurtenant to it an easement of way over a private alley, he is not bound to relieve the alley from the servitude and impose it upon the land he already owned in front of that which he purchased.³

But upon the severance of an estate an easement in land retained to pass as appurtenant without mention must be essentially necessary to the proper enjoyment of the estate granted.⁴ Thus the Court of Appeals of New York say: "Nothing passes by the word 'appurtenances' except such incorporeal easements or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted. A mere convenience is not sufficient to thus create such a right or easement."⁵ The Supreme Court of Connecticut, in a recent decision, say: "Implied grants of land, or of easements, or of any interest in land, are allowed here, when allowed at all, to a very much more limited degree than in the other States. These decisions are in accordance with what has always been the policy of our recording system, that the title to all interests in land shall appear on the land records, so that they may be easily and accurately traced. We think this plain policy should be adhered to, so that men will know what they have to trust, and

¹ Dempsey v. Kipp, 61 N. Y. 462.

² Dority v. Dunning, 78 Me. 381, 6 Atl. Rep. 6; Pettingill v. Porter, 8 Allen, 1, 85 Am. Dec. 671; Kent v. Waite, 10 Pick. 138.

³ Zell v. First Universalist Society, 119 Pa. St. 390, 13 Atl. Rep. 447.

⁴ Manning v. Smith, 6 Conn. 289; Whiting v. Gaylord, 66 Conn. 337; Whaley v. Stevens, 27 S. C. 549, 4 S. E. Rep. 145, 21 S. C. 223; Fitzpatrick

v. Mik, 24 Mo. App. 435, the necessity need not be absolute. Ogden v. Jennings, 62 N. Y. 526; Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531; Griffiths v. Morrison, 106 N. Y. 165; Grubb v. Guilford, 4 Watts, 223, 245, 28 Am. Dec. 700; Evans v. Dana, 7 R. I. 306; Smith v. Smith, 62 N. H. 429, Brakely v. Sharp, 9 N. J. Eq. 9.

⁵ Root v. Wadhams, 107 N. Y. 384, 394, 14 N. E. Rep. 281, per Peckham, J.

can place confidence in the language of all conveyances as they find them recorded.”¹

30. A right of way appurtenant to land is appurtenant to every part of it. It inures to the benefit of all the owners’ heirs, however many there may be, and, if the owner divides it into several lots, the grantee of each lot, however small, has an equal right over the servient land, so far as applicable to his part of the property, provided the right can be enjoyed as to the separate parcels, without unduly increasing the burden upon the servient estate.²

Easements, like covenants that run with the land, “stick so fast to the thing on which they wait, that they follow every particle of it.”³

31. But a reservation may be made in such terms that the right is not appurtenant to the whole of the remaining land of the grantor. Thus if a way is reserved for the benefit of a parcel of the grantor’s remaining land particularly described or indicated, the way is appurtenant to that parcel only.⁴

32. An easement cannot be extended or made to attach to land other than that for the benefit of which it was created.⁵ It can-

¹ Whiting v. Gaylord, 66 Conn. 337, 349, per Andrews, C. J. The easement in the case was an easement of support, and inasmuch as it was not an open and a visible one and was not necessary to the enjoyment of the grantee’s property, although convenient, it did not pass by the conveyance.

² Codling v. Johnson, 9 B. & C. 933; Miller v. Washburn, 117 Mass. 371; French v. Morris, 101 Mass. 68; Whitney v. Lee, 1 Allen, 198, 79 Am. Dec. 727; Underwood v. Carney, 1 Cush. 285; Boland v. St. John’s Schools, 163 Mass. 229; Lefavour v. McNulty, 158 Mass. 413, 33 N. E. Rep. 610; Regan v. Boston Gas Light Co., 137 Mass. 37; Ehret v. Gunn, 166 Pa. St. 384, 31 Atl. Rep. 200; Watson v. Bioren, 1 Serg. & R. 227, 7 Am. Dec. 617; Myers v. Birkey, 5 Phila. 167; Walker v. Gerhard, 9 Phila. 116; McMakin v. Magee, 13 Phila. 105; Morrison v. King, 62 Ill. 30; Garrison v. Rudd, 19 Ill. 558, 564; Dawson v. St. Paul F. & M.

Ins. Co., 15 Minn. 136, 2 Am. Rep. 109; Shields v. Titus, 46 Ohio St. 523, 22 N. E. Rep. 717; Sachs v. Cordes, 11 Ohio C. C. 145; Methodist Prot. Church v. Laws, 7 Ohio C. C. 211; Hills v. Miller, 3 Paige, 254, 24 Am. Dec. 218; Lansing v. Wiswall, 5 Denio, 213; Outerbridge v. Phelps, 13 Abb. N. C. 117; Currier v. Howes, 103 Cal. 431, 37 Pac. Rep. 521, per Searls, C.; Linkenhoker v. Graybill, 80 Va. 835.

³ Conan v. Kemire, Sir W. Jones’ Rep. 245.

⁴ Leach v. Hastings, 147 Mass. 515, 18 N. E. Rep. 405.

⁵ Stearns v. Mullen, 4 Gray, 151; Smith v. Porter, 10 Gray, 66; Cotton v. Pocasset Manuf. Co., 13 Met. 429, 433; Davenport v. Lamson, 21 Pick. 72; Gunson v. Healy, 100 Pa. St. 42; Shroder v. Brenneman, 23 Pa. St. 348; McMakin v. Magee, 13 Phila. 105; French v. Marstin, 24 N. H. 440, 57 Am. Dec. 294; Reise v. Enos, 76 Wis. 634, 45 N. W. Rep. 414, 8 L. R. A. 617.

not be made to attach to other land which the owner of a dominant estate may subsequently acquire. One having a right of way appurtenant to certain land cannot upon a grant of that land reserve such right of way so as to make it apply to other land owned by the grantor. He cannot enlarge the right by reserving the right of way separate and distinct from the lot to which it belongs, to use in connection with another lot.¹

A land-owner conveyed part of his land to a stone company, together with a right to construct a line of railway over the remaining part to connect the land granted with a public railroad. It was held that this easement was appurtenant to the land granted, and the stone company had no right to permit its use by third persons to convey stone quarried on lands owned by them.²

III. *In Gross.*

33. An easement not appurtenant to any land is an easement in gross. In fact, the real distinction between an easement in gross and an ordinary easement is that in the one there is, and in the other there is not, a dominant tenement to which it is attached.³

It has sometimes been said that there is no such thing as an easement in gross; that a privilege not appurtenant to land is not an easement.⁴ The term "easement in gross" is used because it is a term in general use by legal writers, by judges and by the profession; and as against such usage of the term it is useless to attempt to establish a refinement of definition intended to do away with the term.

A right to profits *à prendre* may be either appurtenant to the grantee's land, or personal to him, and therefore in gross.⁵

Easements in gross have some of the characteristics of appurtenant easements, but they are attached to the person of the grantee rather than to his land. The burden of such easements rests upon

¹ *Reise v. Enos*, 76 Wis. 634, 45 N. W. Rep. 414, 8 L. R. A. 617.

² *Hoosier Stone Co. v. Malott*, 130 Ind. 21, 29 N. E. Rep. 412.

³ *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Randall v. Chase*, 133 Mass. 210; *Whaley v. Stevens*, 21 S. C. 221, 27 S. C. 549, 4 S. E. Rep. 145; *Fisher v. Fair*, 34 S. C. 203, 10 S. E. Rep. 470; *Moore v. Crose*, 43 Ind. 30;

Garrison v. Rudd, 19 Ill. 558, 564; *Koelle v. Knecht*, 99 Ill. 396, 403; *Wilmington v. Lawrence*, 116 Ill. 11, 4 N. E. Rep. 356.

⁴ *Goddard on Easem.* (5th ed.) 9; *Rangeley v. Midland R. Co.*, L. R. 3 Ch. 306.

⁵ *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652.

the land of the grantor in favor of the person of the grantee. There is a servient tenement, but no dominant tenement. These personal rights are something more than mere revocable licenses. They confer an interest in the servient tenement which is at least an equitable charge or burden in favor of the grantee.¹

34. Whether a grant of an easement is in gross, or appurtenant to some other estate, may be determined by the relation of the easement to such estate, or by the absence of any such relation.² In case the easement is a right of way, the terminus of the way is of especial significance, in the absence of any declaration in the deed of the intention of the parties in regard to the nature of the way.³

A reservation of a right of way "so long as the grantor may wish to use the same," is not a reservation in gross by reason of the terms of the reserving clause. In the light of the surrounding circumstances, it was held to be the intention of the parties that the right of way should be appurtenant to the grantor's remaining estate.⁴

But a deed to lessees of a right of way from the street to the rear of the store demised to them, to hold so long as they should occupy the building for the business then carried on by them, was held to create merely an easement in gross which terminated when they ceased to carry on the business as owners. The lessees having failed, a corporation was formed to carry on the business and the lessees were employed to assist in conducting it, one of them being chief manager, but it was held that the right of way did not pass to the corporation.⁵

The owner of land on which were springs, by indenture granted to another and his heirs the whole use of the springs, the latter covenanting to furnish the owner with a supply of water for his

¹ Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. Rep. 356.

² Dennis v. Wilson, 107 Mass. 591; Russell v. Heublein, 66 Conn. 486, 34 Atl. Rep. 486.

³ Peck v. Conway, 119 Mass. 546; Dennis v. Wilson, 107 Mass. 591; Stearns v. Mullen, 4 Gray, 151, 155; Mendell v. Delano, 7 Met. 176; Kent v. Waite, 10 Pick. 138; White v. Crawford, 10 Mass. 183, 187; Winston v. Johnson, 42 Minn. 398, 45 N. W. Rep. 958; Louisville & N. R. Co. v. Koelle, 104 Ill. 455; Kramer

v. Knauff, 12 Ill. App. 115, 118; Garrison v. Rudd, 19 Ill. 558. In this case the reservation was of the joint use of a certain alley from a public highway to a river. Neither terminus was on the land of the party claiming the right. It was properly held that the grant was in gross. Kuecken v. Voltz, 110 Ill. 264, 270, per Craig, J.

⁴ Kramer v. Knauff, 12 Ill. App. 115.

⁵ Hall v. Armstrong, 53 Conn. 554, 4 Atl. Rep. 113.

house, and it was provided that if water should not be supplied in the main aqueduct pipe for the space of a whole year at one time, the indenture should be void. It was held that the indenture created an easement in gross, which was terminated by its own limitation on a failure to supply water for a whole year.¹

35. If a right of way has neither of its termini on the land of the grantee, it is not appurtenant, but a way in gross.² A right of way appurtenant is a right which inheres in the land to which it is appurtenant, is necessary to its enjoyment, and passes with the land; while a right of way in gross is a mere personal privilege, which dies with the person who may have acquired it. Hence, although one has acquired such a right of way by deed to him, his heirs and assigns, the same not being appurtenant to any land then owned by him, the right is merely a right in gross, and he cannot assign it to a purchaser of his land to which the way is not incident. Accordingly, where one alleged a right of way from a public road, bounding his plantation, across the defendants' land to a boat landing, and that the right of way was for the use of the plaintiff's plantation, it was held that this was an allegation of a right of way in gross.³

An alleyway reserved by the grantor, both termini of which were disconnected from the land retained by the grantor, is not presumed to be appurtenant to such land, and is therefore a way in gross which does not pass by a conveyance of such retained land.⁴

A right of way not connected with the enjoyment or occupation of land is not annexed as an incident to it. If it is not so connected with the land, it is a way in gross and a personal right merely. It is not in the power of a grantor to create a right unconnected with the use and enjoyment of the land, and annex such right to the land. If he grants a right of way not connected with the use and occupation of the land conveyed, but for purposes wholly unconnected with it, the way is in gross, personal to the grantee, and will not pass with the land to a subsequent purchaser.⁵

36. The right is appurtenant and not in gross when it appears that it was granted for the benefit of the grantee's land. The owner

¹ Owen v. Field, 102 Mass. 90.

³ Whaley v. Stevens, 21 S. C. 221.

² Fisher v. Fair, 34 S. C. 203, 13 S. E. Rep. 470; Whaley v. Stevens, 21 S. C. 221, 27 S. C. 549, 4 S. E. Rep. 145; Garrison v. Rudd, 19 Ill. 558, 564; Sanxay v. Hunger, 42 Ind. 44.

⁴ Garrison v. Rudd, 19 Ill. 558, 560; Lathrop v. Elsner, 93 Mich. 599, 53 N. W. Rep. 791.

⁵ Ackroyd v. Smith, 10 C. B. 164; Thorpe v. Brumfitt, L. R. 8 Ch. 650.

of a spring executed an instrument, which declared that he did lease and let to his grantee, the right and privilege to him and his heirs and assigns forever to lay a pipe from the spring to his dwelling-house and farm. It was held that the instrument conveyed a right appurtenant to the grantee's land, and not a right in gross, for such seems to have been the intention of the parties to the deed, having reference to its language, and the surrounding circumstances.¹

In a partition of land, a right of way set to one over the land of another is to be taken as appurtenant as a matter of course.²

Where it appears by a fair interpretation of a reservation in a deed, in connection with surrounding circumstances, that it was the intention to reserve a right in the nature of an easement in the land conveyed, for the benefit of the grantor's other land, such right will be deemed appurtenant to such land, and not a right in gross.³ The same principle applies in case of a grant of an easement, and the easement so created will be construed to be appurtenant to the grantee's land if the language of the deed and other surrounding conditions will allow of such a construction.⁴

37. The privilege of taking seaweed from a beach may be granted as appurtenant to a parcel of land not bounded by the beach, and in such case the easement is not in gross. The heirs of an owner of real estate which was bounded in part by a sea beach, divided the estate by deed, and assigned to some of them parcels of land bounded by the beach, and to others different parcels. The deeds assigning the latter parcels granted the privilege of getting sea weed from the beach, below the lands granted by the deeds of the parcels on the beach. It was held that the privilege created was annexed to the land of the heirs and was not a right in gross. The court, in giving judgment, say: "As a right or common in gross passes by deed, it is necessary to consider the terms of the grant, to ascertain the nature of the estate intended to be conveyed. And we think it is obvious, from the language of the deed, that the object of the grant was to benefit the owner of the particular estate,

¹ Bissell v. Grant, 35 Conn. 288.

³ Winston v. Johnson, 42 Minn. 398,

² Bowen v. Conner, 6 Cush. 132; Davenport v. Lamson, 21 Pick. 72; Dennis v. Wilson, 107 Mass. 591, 592, per Wells, J.; Karmuller v. Krotz, 18 Iowa, 352; Hopper v. Barnes, 113 Cal. 636, 45 Pac. Rep. 874, approving Dennis v. Wilson, *supra*.

45 N. W. Rep. 958; Louisville & N. R. Co. v. Koelle, 104 Ill. 455; Metzger v. Holwick, 31 W. Law Bul. 241.

⁴ Valentine v. Schreiber, 3 N. Y. App. D. 235, 73 N. Y. St. 838, 38 N. Y. Supp. 417.

by furnishing her with a valuable dressing for her land, and not to give a personal right to her and all her heirs and their assigns, as many as there might be. The privilege, thus subdivided, would be of no personal use or advantage; but, as appurtenant to the particular estate, so that it might be used thereon, it would always enhance its value. We are, therefore, of opinion that the grant created by this deed is an incorporeal hereditament, appurtenant to the estate to which it is annexed, and passes with it; and consequently it is a right which cannot be severed and sold separate from the estate, and thus subdivided *ad infinitum*. Such a sale of the right to a stranger would either be a void grant or would extinguish the right.”¹

38. The rule that the rights of parties to a deed must be ascertained from its words is subject to the modification that surrounding circumstances may be taken into consideration, in order to ascertain the intention of the parties. Thus, where one granted a right of way across his land to three persons, who were owners of coal mines, to the land of one of them as located by an engineer of a railway company, to be used by the grantees and others for railroad and switch purposes, although the land of one of the grantees alone was mentioned in the deed, yet as the switch was located across the lands of the other grantees, it was held that the right of way was appurtenant to their lands, as well as to the land of the other grantee, which was alone described.²

One owning four lots of land, over the rear of which he had laid out an alleyway ten feet wide, conveyed two of them nearest the street from which the alleyway entered, “excepting and reserving therefrom ten feet across the rear end of said premises for an alley.” At the time of the sale the owner did not occupy any part of the land but was a non-resident of the State. It was held that the situation and location of the property and the manner in which it was used, in connection with the reservation of the deed, clearly indicated an intention to create an alley for a right of way, in the nature of an easement in the land so conveyed, for the benefit of the grantor’s other adjoining land. It was doubtless the intention of the grantor to sell his remaining lots, and the reservation of an

¹ Phillips v. Rhodes, 7 Met. 322, 324, 15 Ill. 581; Kramer v. Knauff, 12 Ill. App. 115; Karmuller v. Krotz, 18 Iowa,

² Louisville & N. R. Co. v. Koelle, 352, per Dillon, J.; White v. Crawford, 104 Ill. 455; and see Hadden v. Shoutz, 10 Mass. 183, 188.

alley in the conveyance made was intended as an appurtenant to the remaining lots, which would be beneficial to any future purchaser and would enhance the price he might obtain.¹

39. An easement in gross is neither assignable nor inheritable.² It is a mere personal interest in the land of another; and it is so exclusively personal that the owner of the right cannot permit another person to enjoy it with him. An easement in gross cannot be made assignable or inheritable by any words in the deed by which it was granted. It is attached to the person to whom it is granted and cannot exist except as so attached.³

A grant of the right to lay down an aqueduct and to draw water therefrom for the use of the grantee, without words of inheritance and without language showing an intent to convey an assignable interest, does not convey such an interest.⁴

40. An appurtenant easement cannot be severed from the land, and made a right in gross assignable and inheritable. If a way be granted, as incident to land conveyed by the same deed, for all purposes connected with the occupation of the land, the way is appurtenant to the land; but if in such deed a way be granted to the owner of the land conveyed "for all purposes," the grant of the way is more ample and extended than in the first instance, and the way may be used for purposes unconnected with the enjoyment of the land. Such a way is granted in gross, is personal only, does not pass as incident to the land and cannot be assigned. "It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it, nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee. 'Incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of

¹ Kuecken v. Voltz, 110 Ill. 264.

² Ackroyd v. Smith, 10 C. B. 164; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Louisville & N. R. Co. v. Koelle, 104 Ill. 455; Garrison v. Rudd, 19 Ill. 558; Koelle v. Knecht, 99 Ill. 396; Boatman v. Lasley, 23 Ohio St. 614; Tinicum Fishing Co. v. Carter, 61 Pa. St. 21, 38, 100 Am. Dec. 597; Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. Rep. 20; Fisher v. Fair, 34 S. C. 203, 13 S. E. Rep. 470, 14 L. R. A. 333;

Whaley v. Stevens, 27 S. C. 549, 4 S. E. Rep. 145; Spensley v. Valentine, 34 Wis. 154; Post v. Pearsall, 22 Wend. 425, 432; Hall v. Armstrong, 53 Conn. 554, 4 Atl. Rep. 113.

³ Boatman v. Lasley, 23 Ohio St. 614; Metzger v. Holwick (Ohio) 31 W. L. Bul. 241; Moore v. Crose, 43 Ind. 30; Hoosier Stone Co. v. Malott, 130 Ind. 21, 24, 29 N. E. Rep. 412, see § 42.

⁴ Wilder v. Wheeler, 60 N. H. 351.

any owner.’¹ This principle is sufficient to dispose of the present case. It would be a novel incident attached to land, that the owner and occupier should for purposes wholly unconnected with that land, and merely because he is the owner and occupier, have a right of road over other land; and it seems to us that a grant of such privilege or easement can no more be annexed so as to pass with the land than a covenant for any collateral matter.”²

41. But a right to profits à prendre though in gross is assignable. “A very marked distinction also exists between a way in gross and an easement of *profit à prendre*; such as the right to enter upon the lands of another, and remove gravel or other materials therefrom. The latter so far partakes of the nature of an estate in the land itself, as to be treated as an inheritable and assignable interest.”³ Such a right is an estate in the land itself and it has been questioned whether such a right can properly be called an easement. “If, however, a right to take soil, gravel, minerals, water from a spring, and the like, from another’s land may properly be denominated an easement, then it is proper to say that an easement in gross, for such it might doubtless be constituted, might be both assignable and inheritable.”⁴

42. In some States, however, an easement in gross may be created by grant so as to be assignable or inheritable as when the language of the grant shows unmistakably that the intention is that the right shall be enjoyed by the grantee, his heirs and assigns. “The law is settled in Massachusetts, by a series of decisions, that a right of way may be as well created by a reservation or exception, in the deed of the grantor, reserving or retaining to himself and his heirs a right of way, either in gross, or as annexed to lands owned by him, so as to charge the lands granted with such easement and servitude, as by a deed from the owner of the land to be charged, granting such way, either in gross or as appurtenant to other estate of the grantee.”⁵

¹ Keppell v. Bailey, 2 Myl. & K. 517, per Lord Brougham.

² Ackroyd v. Smith, 10 C. B. 164, 188, per Cresswell, J.

³ § 52. Boatman v. Lasley, 23 Ohio St. 614, 618, per McIlvaine, J.; see, also, Post v. Pearsall, 22 Wend. 425, 432.

⁴ Cadwalader v. Bailey, 17 R. I. 495, 500, 23 Atl. Rep. 20, per Tillinghast, J.

⁵ Bowen v. Conner, 6 Cush. 132, 137, per Shaw, C. J.; citing White v. Crawford, 10 Mass. 183, and other Massachusetts cases in which the rule has been rather assumed and taken for granted than discussed and formally decided; approved in Goodrich v. Burbank, 12 Allen, 459, 90 Am. Dec. 161; French v. Morris, 101 Mass. 68; Owen

Where the owners of several mills and mill privileges on the same waterfall apportioned the water among themselves, and a certain part was assigned to the owner of a fulling mill, for the use of that mill, or for other machinery requiring equal power, it was held that the right was not inseparably annexed to the building or site at which the water was then used, but that it might be used and enjoyed at any convenient site, at which a mill could be so placed as to take an equal quantity of water, without any greater injury to the other mill owners; and, therefore, that the sale by the owner of the fulling mill, of the land across which the water used to run to the fulling mill, in an artificial channel, did not extinguish the fulling mill right, but that the owner of the fulling mill might convey the right to another mill owner for the use of the fulling mill or for any other machinery.¹

The right to take water from a well or spring is an interest in land though not a *profit à prendre*. "The water itself may not be the subject of property, but the right to take it and to have pipes laid in the soil of another for that purpose, and to enter upon the land of another to lay, repair and renew such pipes, is an interest in the realty, assignable, descendible and devisable."² To like effect Judge Curtis said: "I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water from it by pipes, to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house, or not, as I please. * * * Incorporeal rights may be inseparably annexed to a particular messuage or tract of land, by the grant which creates them, and makes them incapable of separate existence. But they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a messuage or land, and again severed therefrom by a conveyance of the messuage or land, without the right or a conveyance of the right without the land."³

v. Field, 102 Mass. 90, 108; Hankey v. Clark, 110 Mass. 262; followed in **Wisconsin**, Poull v. Mockley, 33 Wis. 482, the court saying: "We cannot see any substantial reason for holding that an easement in gross cannot be assigned or transferred."

¹ Hurd v. Curtis, 7 Met. 94.

² Goodrich v. Burbank, 12 Allen, 459, 461, 90 Am. Dec. 161; approved in French v. Morris, 101 Mass. 68.

³ Lonsdale Co. v. Moies, 21 Law Rep. 658, 664.

43. An easement in gross may be in perpetuity, if so expressly made. An easement granted to a city, "its successors and assigns," is capable of assignment, and is, therefore, in perpetuity, though not technically in fee, because an easement in fee must be appurtenant to land held in fee.¹

A water right granted in gross does not become technically appurtenant to land and a mill, upon and for which it is subsequently used by the grantee thereof; but where such water power is taken and applied to run a mill afterwards acquired by the owner of the power, and afterwards, while the water power is so being used, the owner conveys the premises by metes and bounds without mentioning the water right, the right may pass therewith as parcel thereof, if such appears to have been the intention of the parties. "This water right was created and existed as a substantive and independent right, in gross, before the acquisition by the owners thereof of the lots mentioned in the mortgages. It was an easement without any fixed or limited dominant estate, whatever property it might be used with or upon, being such estate for the time being; and although it has since been taken to said lots, and there applied to run a mill and machinery thereon, and thereby become, so to speak, in fact appurtenant to such property, still it may be again separated therefrom and taken and applied elsewhere. The water right was granted without any restriction or limitation as to the nature or place of its use, and therefore the power may be applied as and where the circumstances will permit, and such application may be changed from time to time, both as to use and place at the pleasure of the owner."²

The owner of a spring and aqueduct leading therefrom entered into an indenture with the occupant of a house as a life tenant, which provided that the latter, his heirs and assigns, might draw from the aqueduct as much water as should be necessary for the supply of the families resident in the house, so long as water should run from the spring through the aqueduct. After the death of the life tenant, his heirs conveyed this right to his widow, who continued to reside in the house. It was held that the indenture conveyed an easement in gross, which could be conveyed by the heirs of the life tenant, and enforced by an assignee residing in the house.³

¹ Pinkum v. Eau Claire, 81 Wis. 301,
51 N. W. Rep. 550.

³ Amidon v. Harris, 113 Mass. 59,
and see Hankey v. Clark, 110 Mass.

² Bank v. Miller, 6 Fed. Rep. 545, 550. 262.

44. An easement is personal when it is expressly or by implication limited to the life of the person who is to enjoy it. Thus where two persons held land in partnership under agreement that mills thereon should be kept up during their joint lives and the life of the survivor, at their joint expense, and, on one of them dying, the mill site was partitioned to the survivor, and the rest of the tract to heirs of the deceased, any easement which the survivor might have, under the agreement, to overflow the lands of the heirs, was personal, and terminated at his death.¹

But an easement such as right of way may be appurtenant to a life estate in land, for instance, a dower estate, and will then expire with the estate.² In such case the easement is appurtenant and not in gross. "Whether a way is appurtenant to land depends upon its relation to the land in respect of use, and not upon any correspondence with the title of the owner in respect of duration. A way of necessity which rests upon implied grant is always appurtenant, although limited by the continuance of the necessity to which it owes its existence. The limitation of a right in express terms, to the life of a person, may afford some ground of inference that it was intended as a personal right; but that ground of inference would be overcome if the nature of the right and its apparent use were such as to indicate that it related to the convenience or occupation of real estate. When, however, the limitation results from omitting words of inheritance by an inartificial reservation, the inference in that direction, if any can be drawn therefrom, must be very slight."³

An easement is personal or in gross in case it is reserved by a grantor for the benefit of a lessee to whom the easement was necessary, or to whom the grantor had given it; but in such case the easement would last only during the continuance of the lease.⁴

45. In those States in which the word "heirs" is not necessary to the granting of an estate in fee, an easement is not personal because such word is not used, if it appears from the deed that the right to the use of the easement was not to be limited to the lifetime of the party who was to enjoy it. Thus, where one granted to the

¹ *McDaniel v. Walker* (S. C.), 24 S. E. Rep. 378, and see *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen, 159, 170.

³ *Dennis v. Wilson*, 107 Mass. 591, 594, per Wells, J.

² *Hoffman v. Savage*, 15 Mass. 130; *Dennis v. Wilson*, 107 Mass. 591, 594.

⁴ *Russell v. Heublein*, 66 Conn. 486, 34 Atl. Rep. 486.

owner of a cheese factory the right to use the waters of a spring in carrying it on, "so long" as the same shall be used for running a cheese factory, the instrument was declared to create an easement which was not personal to the grantee, but might be enjoyed by a successor in title. The purpose of the instrument was to secure water for the factory, and notwithstanding it was in the form of a lease, and contained no words of inheritance, a subsequent purchaser of the factory was entitled to enjoy the easement.¹

A clause in the granting part of a deed creating an easement by the word "agree," without the use of the word "heirs," is controlled by the habendum which follows in which the limitation is in fee, and consequently the easement is in fee.²

46. A way is in gross when the use of it is granted to one, and certain other persons designated, to whom he may grant an easement over the same way. Thus, where the owner of a lot grants the use of a private alleyway, entirely upon his lot, to an adjoining property owner, his heirs and assigns, and provides that the grantee shall have the right to convey the privilege granted to certain persons named, the grant is one in gross, and does not become appurtenant to the land of the grantee, and he cannot convey the easement thereby obtained to persons other than those named in the grant, and he cannot invest others with the powers conferred upon him by deed of indenture.³

A devise by a father to his son, his heirs and assigns, of a portion of his farm, "with free privilege of taking what coal he wants for his own use or plantation off the home plantation," on which there was an open mine, was held to confer a personal privilege upon the son, which did not pass to his successors in title to the land devised to him. "The language which is descriptive of the privilege limits

¹ *Whitney v. Richardson*, 59 Hun, 601, 13 N. Y. Supp. 861, and see *Karmüller v. Krotz*, 18 Iowa, 352.

² *Hogan v. Barry*, 143 Mass. 538, 10 N. E. Rep. 253.

³ *Fisher v. Fair*, 34 S. C. 203, 210, 13 S. E. Rep. 470. *McIves, J.*, delivering the opinion said: "Assuming that the owner of land having the right to convey to another a right of way in gross over his land, may invest a third person with power to make such conveyance, yet such a power when not

coupled with an interest, does not survive, nor can it be exercised after the donor of the power parts with his title to the land to be subjected to such easement. In such a case the donee of the power acts as a mere attorney in fact, and must convey in the name of his principal. Hence when the principal is dead, or has parted with his title to the land, neither he nor his attorney in fact can fix any burden or servitude upon the land."

the exercise and enjoyment of it to the person on whom it was bestowed, and negatives any implication that it is appurtenant to the land devised to him. It is the coal he might want for his own use, etc., that could be taken from the home plantation by virtue of this privilege, and not the coal which his heirs or assigns might want for their 'use or plantation.' The inclusion of heirs and assigns in the designation of the persons who were to enjoy the land devised, and the exclusion of them from the enjoyment of the coal privilege were not accidental, but intentional. The failure to expressly charge the home plantation with a permanent servitude in favor of the land devised to the son is confirmatory of this view. A plain distinction exists between such a servitude and a personal privilege to one devisee to take coal for his own use from the land of another." ¹

47. An easement is never presumed to be in gross when it can fairly be construed to be appurtenant to some estate. "If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross, the rule for the construction of such grants being more favorable to the former than to the latter class." ²

¹ *Youghiogheny River Coal Co. v. Pierce*, 153 Pa. St. 74, 77, 25 Atl. Rep. 1026, per McCollum, J.

² *Cadwalader v. Bailey*, 17 R. I. 495, 499, 23 Atl. Rep. 20, 14 L. R. A. 300, per Tillinghast, J.; to like effect, *McMahon v. Williams*, 79 Ala. 288; *Dennis v. Wilson*, 107 Mass. 591; *Smith v. Porter*, 10 Gray, 66; *Louisville & N. R. Co. v. Keolle*, 104 Ill. 455; *White v. Crawford*, 10 Mass. 183; *Kuecken v. Voltz*, 110 Ill. 264; *Kramer v. Knauff*, 12 Ill. App. 115; *Oswald v. Wolf*, 126 Ill. 542, 19 N. E. Rep. 28, 25 Ill. App. 501; *French v. Williams*, 82 Va. 462; *Sanxay v. Hunger*, 42 Ind. 44; *Reise v. Enos*, 76 Wis. 634, 45 N. W. Rep. 414, 8 L. R. A. 617; *Spensley v. Valentine*, 34 Wis. 154; *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Taylor v. Dyches*, 69 Ga. 455; *Case of*

a Private Road, 1 Ashm. 417, 421; *Hopper v. Barnes*, 113 Cal. 636, 41 Pac. Rep. 874; *Boatman v. Lasley*, 23 Ohio St. 614; *Metzger v. Holwick*, 31 W. L. Bul. 241; *Winston v. Johnson*, 42 Minn. 398, 45 N. W. Rep. 958; *Valentine v. Schreiber*, 3 N. Y. App. D. 235, 240, 73 N. Y. St. 838; 38 N. Y. Supp. 417; *Kent Furniture Manuf. Co. v. Long (Mich.)*, 69 N. W. Rep. 657. In *McMahon v. Williams*, 79 Ala. 288, 291, it was said: "The inquiry in these cases has generally been whether the servitude or restriction imposed was of such a nature as to operate as an inducement to purchasers, and, if so, the inclination of the courts has been to construe them as appurtenant to the estate, and intended for its protection, rather than as personal to the grantor."

A contract reciting that in consideration that the grantees were erecting a saw mill near defendants' mill, and a payment of cash, the defendants do "grant, bargain, sell, etc., to the parties of the second part, their heirs and assigns, forever," the undivided one-half of a railroad side track, "to the sole and only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns, forever," is a conveyance of a right of way appurtenant to the grantees' mill, and not a mere license.¹

48. A right of way, whether granted or reserved, is not in gross when there is anything in the deed or the situation of the property which indicates that it was intended to be appurtenant to the land retained by the grantor or granted by him.² Thus, where a person conveys a part of his land by a deed, "reserving from said grant the perpetual right of way for a private way through on the south side of said lot," the right of way thus reserved is appurtenant to that portion of the land retained by the grantor, the word "heirs" not being necessary in such a reservation to create an easement running with the land.³ And so a reservation in the words, "excepting and reserving a right of way to pass and repass over said land with teams and otherwise, on the northerly side of said premises, not exceeding eight rods from old Worcester road," created an easement appurtenant to the land remaining in the grantor.⁴

When in the deed itself there is no declaration of the intention of the parties in regard to the nature of the way, whether it is a personal privilege or is appurtenant to the land of the person upon whom the privilege is conferred, this may be determined by the relation of the way to such land or its want of any relation.⁵

In a deed to a railroad of a right of way, a reservation of a passway at grade over the railroad, for the purpose of connecting two tracts of land belonging to the grantor which were separated by the railroad, is a perpetual easement annexed to the land which was made accessible by the passway. The right of way is not a personal one to the grantor limited to his lifetime.⁶

Where the owner of a tract of land sells a part of it reserving a

¹ Kent Furniture Manuf. Co. v. Long (Mich.), 69 N. W. Rep. 657.

⁴ Dennis v. Wilson, 107 Mass. 591.

² Lathrop v. Elsner, 93 Mich. 599, 53 N. W. Rep. 791; Thorpe v. Brumfitt, L. R. 8 Ch. 650, 657.

⁵ Dennis v. Wilson, 107 Mass. 591; Mendell v. Delano, 7 Met. 176; Brown v. Thissell, 6 Cush. 254.

³ Lathrop v. Elsner, 93 Mich. 599, 53 N. W. Rep. 791.

⁶ White v. New York & N. E. R. Co., 156 Mass. 181, 30 N. E. Rep. 612.

right of way across it, and in the same deed grants to the purchaser a right of way across the unsold half, these rights are annexed and appurtenant to the respective parcels, each becoming the dominant parcel in respect to the right of way secured across the other.¹

IV. *Profit à prendre*.

49. A right to profit à prendre is a right to take something which is the produce of the land, and is in its nature an incorporeal right incapable of livery, though it is imposed upon corporeal or tangible property. It may be appurtenant to a dominant tenement in the nature of an easement; or it may be, and perhaps more frequently is, a right in gross. When this right is appurtenant, it passes by any conveyance that is sufficient to convey the dominant tenement; and it passes with that by descent. Like an easement it is inseparable from the dominant tenement.² It is not an easement within the usual definition of that right, as being a privilege without profit,³ but it is within the definition of that right as stated by some authorities.⁴ “A right of *profit à prendre*, which may be held apart from the possession of land, differs therein from an easement, which requires a dominant tenement for its existence. But a right of *profit à prendre*, if enjoyed by reason of holding another estate, is regarded in the light of an easement appurtenant to such other estate. And, says Mr. Justice Strong,⁵ some modern decisions have called it an easement, though it was a privilege on another man’s land with profit. It is immaterial, however, whether we call it an easement or a right of profit *à prendre* annexed to land. It is

¹ *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354, per Crockett, J., dissenting. The majority of the court in this case held that inasmuch as the grantor made no mention of the estate to which the right of way reserved was to be appurtenant the right reserved was a right in gross and not appurtenant to the grantor’s remaining land. This decision seems to be wrong and the dissenting opinion right. It seems to be obvious that the right reserved was intended to be annexed to the grantor’s remaining land and to become appurtenant to it. It would have been differ-

ent if his remaining land had not been connected with the land conveyed.

² *Drury v. Kent*, Cro. Jac. 14; *Bailey v. Stephens*, 12 C. B. N. S. 91; *Goodrich v. Burbank*, 12 Allen, 459, 461, 90 Am. Dec. 161; *Pierce v. Keator*, 70 N. Y. 419, 421, 26 Am. Rep. 612.

³ § 1.

⁴ *Ritger v. Parker*, 8 Cush. 145, 54 Am. Dec. 744, per Shaw, C. J.; *Owen v. Field*, 102 Mass. 90, 103, per Ames, J.; *Post v. Pearsall*, 22 Wend. 425.

⁵ *Huff v. McCauley*, 53 Pa. St. 206, 209, 91 Am. Dec. 203.

the same in nature, and is such a right as can be annexed to other land by express grant, and will pass as appurtenant to it.”¹

A right to *profits à prendre*, when attached to other land, as an appurtenance, is in the nature of an easement, but when not attached to other land is a right in gross. When such a right to the products or proceeds of land is not granted in favor of some dominant tenement it cannot properly be said to be an easement but an interest or estate in the land itself.² Thus, where one conveyed land bordering on a mill pond belonging to him, and also as an incident to the conveyance granted the exclusive right to take ice from the pond, it was held, that the right was an appropriate adjunct of the land conveyed, and became an appurtenance thereto, in the nature of an easement, and upon a conveyance by the grantee passed with the land without particular mention as an appurtenance.³

50. A right to profits à prendre, acquired by grant or prescription, as appurtenant to certain lands, cannot be used as a right in gross, wholly unconnected with that land. Thus a claim of a right by the owners or occupiers of a certain close, as appurtenant to such close, to enter upon the land of another and cut and carry away all the wood growing there, does not justify their cutting down the wood and selling it at their pleasure, wholly irrespective of the close to which the right is appurtenant. A prescriptive right in the owner of an estate to take, as appurtenant to that estate, all the thorns growing upon the land of another, to be used at the house of such owner, is a right appurtenant to that estate, a profit to be taken in the land of another, to be used upon the land of the party claiming the profit.⁴ Such a right must be used for the benefit of the estate to which it is appurtenant. It cannot be used for the benefit of the individual owner of that estate, as it might in cases where the grant is in gross. The owner of the dominant tenement cannot claim as appurtenant to it a profit wholly unconnected with the enjoyment of it.⁵

¹ Grubb v. Grubb, 74 Pa. St. 25, 33, per Agnew, J.

² Huntington v. Asher, 96 N. Y. 604, reversing 26 Hun, 496; Taylor v. Mil-lard, 118 N. Y. 244, 23 N. E. Rep. 376, 6 L. R. A. 667; Post v. Pearsall, 22 Wend. 425; Pierce v. Keator, 70 N. Y. 419, 421, 26 Am. Rep. 612; Huff v.

McCauley, 53 Pa. St. 206, 209, 91 Am. Dec. 203; Grubb v. Grubb, 74 Pa. St. 25, 33.

³ Huntington v. Asher, 96 N. Y. 604; 48 Am. Rep. 652.

⁴ Dowglass v. Kendal, Cro. Jac. 256.

⁵ Bailey v. Stephens, 12 C. B. N. S. 91, 109.

51. On the other hand, if the right is not appurtenant but in gross, it does not pass by a conveyance of the land. A deed conveying a strip of land through a farm to a railroad company for a right of way, contained a reservation of "the privilege of mowing and cultivating the surplus ground of said strip of land, not required for railroad purposes." At the time of the conveyance there was a mortgage on the farm, which was subsequently foreclosed. One who succeeded to the title of the purchaser at the foreclosure sale entered upon the railroad land and cut and removed the wheat growing thereon. In an action of trespass for such entry it was held, that the reservation in the deed to the railroad company was not an easement appurtenant to the remaining portion of the farm, but a right to profits in the land conveyed, reserved to the grantors personally, not as owners of or for the benefit of the farm; and such right therefore, did not pass by the deed on foreclosure sale. "From the nature of the right," say the Court of Appeals of New York, "we can see no connection between it and the ownership of the farm. The right to mow and cultivate this strip was in no way necessary to, or even useful, to the remainder of the farm, and it was not, therefore, appurtenant. It might have been regarded in the nature of an easement if the reservation had been made to the grantor as owner of the farm, or on account of being the owner, but the language reserves the right to the parties of the first part, not to their heirs and assigns, nor to the owners of the farm, nor for the benefit of the farm or such owners. As the terms of the reservation indicate a personal privilege, and as there is nothing in the nature of the right reserved connecting it in any manner with the ownership or use of the remainder of the farm, there seems no alternative but to apply the established rules and recognized legal distinctions to the transaction."¹

52. A right of profit à prendre when in gross is an inheritable and assignable interest, partaking of the nature of an estate in the land itself.² It may be an estate for the life of the person having

¹ *Pierce v. Keator*, 70 N. Y. 419, 422, 26 Am. Rep. 612, per Church, C. J.

² *Palmer's Case*, 5 Coke, 24*b*; *Wickham v. Hawker*, 7 M. & W. 63; *Muskett v. Hill*, 5 Bing. N. C. 694; *Bailey v. Stephens*, 12 C. B. N. S. 91; *Goodrich v. Burbank*, 12 Allen, 459, 461, 90 Am. Dec. 161; *Hill v. Lord*, 48 Me. 83, 96;

Post v. Pearsall, 22 Wend. 425, 432; *Leyman v. Abeel*, 16 Johns. 30; *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. Rep. 376, 6 L. R. A. 667; *Pierce v. Keator*, 70 N. Y. 419, 421, 26 Am. Rep. 612; *Huntington v. Asher*, 96 N. Y. 604, 610, 48 Am. Rep. 652; *Huff v. McCauley*, 53 Pa. St. 206, 209, 91 Am. Dec. 203;

the right, or for the lives of the occupants of certain land, or an estate for a definite or indefinite term. It is always assignable and in proper cases inheritable. The right may in terms be granted or reserved to one, his heirs and assigns, and then it is in terms inheritable and assignable.¹

53. Profits à prendre can be acquired only by grant or prescription. When acquired by prescription they are most generally, though not universally, prescribed for, not in gross, but as incident to land, for the benefit of which and in connection with which, the rights are to be exercised.² In other words, if one would prescribe for such a right in another's land, as authorizes the taking or having what is, by legal intendment, a profit therein, he should allege it as pertaining to some particular land, owned by himself, and that he and all those whose estate he has in the land, have from time immemorial, or for the prescriptive period, exercised the right which he now claims.³

Common appurtenant and in gross may arise either by grant or by prescription.⁴ Common appendant always implies prescription, but in pleading common appendant it is not necessary to add the usual form of prescribing. Common appendant, usually consisting of common of pasture, is essentially part and parcel of an ancient tenement.⁵

There is a distinction between a common appendant and a common appurtenant, in this, that if the commoner purchases part of the land in which he has common appendant, the right is not extinguished, but will be apportioned.⁶ But a common appurtenant cannot be extinct in part and be *in esse* for part, by act of the par-

Gloninger v. Franklin Coal Co., 55 Pa. St. 1, 14, 93 Am. Dec. 720; Grubb v. Grubb, 74 Pa. St. 25, 33; Boatman v. Lasley, 23 Ohio St. 614, 618; Cadwalader v. Bailey, 17 R. I. 495, 501; 23 Atl. Rep. 20.

¹ Welcome v. Upton, 6 M. & W. 536; Goodrich v. Burbank, 12 Allen, 459, 461, 90 Am. Dec. 161, per Foster, J.; Post v. Pearsall, 22 Wend. 425; Leyman v. Abeel, 16 Johns. 30; Pierce v. Keator, 70 N. Y. 419, 421, 26 Am. Rep. 612; Tinicum Fishing Co. v. Carter, 61 Pa. St. 21, 39, 100 Am. Dec. 597; Cadwala-

der v. Bailey, 17 R. I. 495, 500, 23 Atl. Rep. 20.

² Merwin v. Wheeler, 41 Conn. 14, 25; Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333.

³ Littlefield v. Maxwell, 31 Me. 134, 50 Am. Dec. 653.

⁴ Cowlam v. Slack, 15 East, 108, 10 Eng. Rul. Cas. 265.

⁵ Co. Litt. 122a, Hargrave's *ii*; Tyringham's Case, 4 Coke Rep. 36b, 10 Eng. Rul. Cas. 252.

⁶ Tyringham's Case, 4 Coke Rep., *supra*.

ties. If a commoner purchases a part of the common appurtenant, his right of common is extinct.¹

54. A profit à prendre in the soil of another cannot be claimed by custom.² Thus a claim to enter upon the land of another and take gravel, stones, and sand from the seashore, made in behalf of the inhabitants of a township, is without foundation. "A claim by the inhabitants of the township is a claim by persons who are incapable of taking a grant, not being a corporation; neither do they claim in a *que* estate — alleging the right to be in the owners of an estate of which they are the occupiers."³ In the case from which the quotation is made, Willes, J., also said: "I am of the same opinion; as far as the right is claimed by custom, if any such exist, it is clearly bad. The distinction is well established, that by custom you may claim an easement to be enjoyed over the land of another, but you cannot claim a profit out of the land. The only difficulty in these cases is, to ascertain what is a *profit à prendre*, and what an easement. All the authorities which have a tendency to show that there may be a custom for a *profit à prendre in alieno solo* must be considered as overruled."

In like manner it was held in New Hampshire that the inhabitants of a town or village cannot claim to take sand for the purpose of making mortar from the land of another, by right of custom.⁴

55. Water is not considered as produce of the soil, so as to make the right to take it a profit à prendre in alieno solo;⁵ whether it

¹ Bell v. Ohio & P. Ry. Co., 25 Pa. St. 161, 64 Am. Dec. 687.

² Gateward's Case, 6 Coke, 596, Cro. Jac. 152, 10 Eng. Rul. Cas. 245; Grimstead v. Marlowe, 4 T. R. 717; Constable v. Nicholson, 14 C. B. N. S. 230; Blewett v. Tregonning, 3 Ad. & El. 554; Rogers v. Brenton, 10 Q. B. 26, 60; Waters v. Lilley, 4 Pick. 145. 16 Am. Dec. 333; Perley v. Langley, 7 N. H. 233; Pearsall v. Post, 20 Wend. 111; Post v. Pearsall, 22 Wend. 425; Smith v. Floyd, 18 Barb. 522, 529; Hill v. Lord, 48 Me. 83; Moor v. Cary, 42 Me. 29; Littlefield v. Maxwell, 31 Me. 134. 50 Am. Dec. 653; Merwin v. Wheeler, 41 Conn. 14; Cobb v. Davenport, 33 N. J. L. 223, 97 Am. Dec. 718; Nudd v. Hobbs, 17 N. H. 524; see § 82.

³ Constable v. Nicholson, 14 C. B. N. S. 230, 240, per Erle, C. J.

⁴ Perley v. Langley, 7 N. H. 233; Nudd v. Hobbs, 17 N. H. 524.

⁵ Manning v. Wasdale, 5 Ad. & El. 758, 763, where Lord Denman said, "it is not consistent with ordinary language to call the taking of water a *profit à prendre*" and Williams, J., said: "I think the right claimed is a mere easement." In Weekly v. Wildman, 1 Ld. Raym. 405, 407, Blencowe, J., said: "Inhabitants may have a custom to have pot water which is an interest and not barely an easement; but Powell, J., denied that and said that is only an easement." See, also, Wickham v. Hawker, 7 M. & W. 63; Race v. Ward, 4 El. & Bl. 702; Bissell v. Grant, 35

be water in an open running stream, or water in a spring or well; "for water," says Blackstone,¹ "is a movable wandering thing and must of necessity continue common by the law of nature." Such a right is an easement only and may be claimed by custom. "The spring of water is supplied and renewed by nature; it must have flowed from a distance by an underground channel; and, when it issues from the ground, till appropriated for use, it flows onward by the law of gravitation." It is no part of the soil, like sand or clay or stones; nor the produce of the soil, like grass or trees.² "Thus, the right to enter upon the close of another, and take water for domestic purposes from any natural fountain, as a pond,³ or a running spring,⁴ has been held to be an easement only, sustainable by proof of custom by the inhabitants. The grounds upon which these decisions rest, are that running water is not a product of the soil, whether above or below the surface; and that it does not remain for any appreciable period of time in any one place. The courts, in these cases, expressly affirm that the right to water in wells, or cisterns, would be an interest in the land, or a right to a *profit à prendre*."⁵

The privilege of watering cattle at a pond or brook or of taking the water for domestic purposes is a mere easement and not a *profit à prendre*.⁶ But in case water is made the subject of sale in gross, as a thing of value, or it is stored in wells or cisterns, it may be regarded as a species of *profit à prendre*, and may be the subject of a separate transfer.⁷

56. The right to take seaweed from the shore is a right to a profit in the soil. This right may be conveyed by the owner of an estate, without conveying the soil, or the right may be acquired by prescription. A town in its corporate capacity might acquire such a right by grant, but not by prescription unless corporate acts are shown. A lost grant to the town can be presumed only from cor-

Conn. 288; Goodrich v. Burbank, 12 Allen, 459, 461, 90 Am. Dec. 161; Hill v. Lord, 48 Me. 83, 100; Borst v. Empie, 5 N. Y. 33; Spensley v. Valentine, 34 Wis. 154.

¹ 2 Blackst. Com. 18.

² Race v. Ward, 4 El. & Bl. 702, 709, per Lord Campbell, C. J.

³ Manning v. Wasdale, 5 Ad. & El. 758.

⁴ Race v. Ward, 4 El. & Bl. 702.

⁵ Hill v. Lord, 48 Me. 83, 99, per Davis, J.

⁶ Manning v. Wasdale, 5 Ad. & El. 758.

⁷ Hall v. Ionia, 38 Mich. 493; Goodrich v. Burbank, 12 Allen, 459, 461, 90 Am. Dec. 161; Hill v. Shorey, 42 Vt. 614; Hill v. Lord, 48 Me. 83, 100.

porate acts. A use of the right by the inhabitants of the town is no sufficient basis for claiming a corporate right in the town. The inhabitants of a town cannot acquire by prescription a right to take seaweed, for there could be no presumption of a grant, as an inhabitant cannot purchase for himself and his successors.¹ The inhabitants of a town may by custom acquire an easement, but not an interest in the land, or a right to take a profit in it, such as a right to take seaweed from the land of another. In reply to the objection that seaweed is not a product of the soil where it is deposited and that if not taken away much of it is washed away by the same tides that brought it to the shore, the Supreme Court of Maine say: "So far as any general rule can be deduced from these cases, they tend to the conclusion that the right to take seaweed is a right to take a profit in the soil. It does not come within the principles applied to aquatic rights. The subject of it is, in part, a product of the soil where it is found. And, in regard to that portion which is washed ashore by the tides, though not permanently remaining, the right which the owner of the flats has to it is much more analogous to the *jus alluvionis* of riparian proprietors, than to the right of appropriating waifs or derelict goods, to which it is compared by the counsel for the defendant." ²

57. The right to take coal or any mineral from the land of another is a right of profit à prendre, and is an incorporeal right incapable of creation except by grant or prescription.³ The grantee of the right acquires no property in the land itself, but only in the coal or ore that he may take from the land; though a grant of the mine or of all the coal or ore in the land is a grant of part of the land.⁴ A grant of the exclusive right to take all the coal in certain land is in effect a sale of the coal itself. It is not an incorporeal right but a right to part of the land itself.⁵

¹ Hill v. Lord, 48 Me. 83; Sale v. Pratt, 19 Pick. 191; Green v. Chelsea, 24 Pick. 71.

² Hill v. Lord, 48 Me. 83, 100, per Davis, J. See, also, Emans v. Turnbull, 2 Johns. 313, 3 Am. Dec. 427; Sale v. Pratt, 19 Pick. 191; Church v. Meeker, 34 Conn. 421.

³ § 64; Manning v. Wasdale, 5 Ad. & El. 758; Huff v. McCauley, 53 Pa. St. 206, 209, 91 Am. Dec. 203; Clark v. Way, 11 Rich. 621.

⁴ Muskett v. Hill, 5 Bing. N. C. 694, 706; Doe v. Wood, 2 B. & Ald. 724, 738; Chetham v. Williamson, 4 East, 469; Grubb v. Bayard, 2 Wall. Jr. 81; Grubb v. Grubb, 74 Pa. St. 25; Gloninger v. Franklin Coal Co., 55 Pa. St. 9, 93 Am. Dec. 720; Johnstown Iron Co. v. Cambria Iron Co., 32 Pa. St. 241, 72 Am. Dec. 783; Worcester v. Green, 2 Pick. 425, 429, per Wilde, J.

⁵ Caldwell v. Fulton, 31 Pa. St. 475, 72 Am. Dec. 760.

The right to enter upon lands of another for any of the following purposes has been held to be a right to take a profit in the soil: — to cut grass,¹ for pasturage,² for the purpose of hunting,³ or for fishing in an unnavigable stream.⁴ So, also, to take away drifting sand from the beach,⁵ or to pile wood and lumber thereon for the purpose of sale and shipment,⁶ or to use the wood, timber, soil, gravel or stone on certain land.⁷

58. A grant of a right to take and kill game on land or waters belonging to the grantor is a grant of an interest in the land itself within the statute of frauds.⁸ It is a grant of a *profit à prendre*.⁹ “The property in animals *feræ naturæ*, while they are on the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them, by a grant of hunting, shooting, fowling and so forth. That right may be granted by the owner of the fee simple and such a grant is a license of a *profit à prendre*.”¹⁰

The right to take fish in waters upon another's land is not an easement. In an old case the court said: “The word ‘easement’ is known in law, but here the thing itself is set forth, namely, to catch fish, and certainly no instance can be given of a prescription for such a liberty by such a word or name.”¹¹

A privilege to shoot, take and kill wild fowl on the lakes and waters of the grantor is strictly confined to the lakes and waters and cannot be exercised upon the grantor's lands.¹²

A grant of such right to persons named, their heirs and assigns, is a grant to the individuals named and their assigns; but it does not authorize them to grant indiscriminately to others the right to exercise the same privilege.¹³

¹ Viner, Tit. Prescription.

² Cro. Eliz. 180, 363.

³ Pickering v. Noyes, 4 B. & C. 639; Wickham v. Hawker, 7 M. & W. 63.

⁴ Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333.

⁵ Blewett v. Tregonning, 3 Ad. & El. 554; Merwin v. Wheeler, 41 Conn. 14.

⁶ Littlefield v. Maxwell, 31 Me. 134, 50 Am. Dec. 653; State v. Wilson, 42 Me. 9, 28. The foregoing enumeration is in the language of the court in Hill v. Lord, 48 Me. 83, 100.

⁷ Texas & P. R. Co. v. Durrett, 57 Tex. 48, 52.

⁸ Webber v. Lee, 9 Q. B. D. 315; Post v. Pearsall, 22 Wend. 425.

⁹ Webber v. Lee, 9 Q. B. D. 315; Wickham v. Hawker, 7 M. & W. 63; Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333; Bingham v. Salene, 15 Ore. 208, 14 Pac. Rep. 523; Tinicum Fishing Co. v. Carter, 61 Pa. St. 21, 37, 100 Am. Dec. 597; Cobb v. Davenport, 33 N. J. L. 223, 97 Am. Dec. 718.

¹⁰ Ewart v. Graham, 7 H. L. Cas. 331, 344, per Campbell, L. C.

¹¹ Peers v. Lucy, 4 Mod. 362, 366.

¹² Bingham v. Salene, 15 Ore. 208, 14 Pac. Rep. 523.

¹³ Bingham v. Salene, 15 Ore. 208, 14 Pac. Rep. 523.

59. A right to hunt, fish and fowl, granted to one, his heirs and assigns, is a profit à prendre in gross, and may be exercised by the servants of the grantee. The addition of the words “with servants or otherwise” does not in legal effect add anything to the grant, nor does it limit the privilege and exclude the exercise of it by the servants in the master’s absence. Baron Parke, so deciding, said: “The authorities upon this subject take this distinction: that if there be a personal license of pleasure, it extends only to the individual, and it cannot be exercised with or by servants; but if there is license of profit, and not for pleasure, it may. This will be found so laid down in the Duchess of Norfolk’s case,¹ which was this: The Duchess brought an action for chasing in her park, against Wiseman and others. They pleaded that the Duchess licensed the Earl of Suffolk to hunt at his pleasure in the park, and they shewed at the time of the trespass the Earl came into the park, and the defendants with him, to hunt: and it was moved that the plea was bad, for by the license given to the Earl, which was only for pleasure and extended only to him, and no other could justify by that license; for if I give license to a man to eat with me none of his servants can justify the entry into my house by reason of that license, for it is a license of pleasure; and so if I give leave to another to go at his pleasure into my orchard, none of his servants can justify by that license; but if it is a license of profit, and not of pleasure, it is otherwise; for if one give leave to me to carry over his land with my cart, my servants can justify by his license; and so if one gives me license to have a tree in his wood, my servants may justify the cutting of the wood, and the entry, for I shall have profit by that: and so was the opinion of the court: and then the defendants said the Duchess gave license to the Earl to hunt, kill, and take with him the deer at his pleasure, and then they said that the Earl came there and they with him, and by his command, hunted and took away and that was held good.”²

60. The right to take fish in any water not navigable prima facie belongs to the owner of the soil over which the water flows or stands; for the ownership of the soil in ordinary cases carries with it the ownership of the water. But when the ownership of the water is in one person and the ownership of the soil under the water

¹ Year Book, 12 Hen. 7, 25, and 13 Hen. 7, 13, pl. 2.

² Wickham v. Hawker, 7 Mees. & W. 63, 77.

is in another the right of fishing in the water belongs to the former, for he owns the element in which alone the fish can exist.¹

The mere fact that one owns land along the shore of a pond which belongs to another gives him no right to fish in the pond.²

A custom to take fish *in alieno solo* is not a good custom.³

The right of fishing in navigable waters is common to all, except when an exclusive right has been acquired by grant or prescription.⁴

But the owner of the soil which is flowed by the water of a pond has no right to fish in such water, when he has released all easements, privileges, and rights in the pond except the right to use a certain quantity of water from it for a mill. Such a release cuts off the right to fish and the releasor cannot thereafter claim such right as incident to his ownership of the soil under the pond.⁵

61. A several or exclusive right of fishing on the land of another may be gained by an adverse and uninterrupted enjoyment of it for the period required by the statute of limitations. The right so acquired is good against all the world and can be maintained even against the owner of the soil.⁶ To acquire such right by use in any case, the possession and use must be exclusive as well as uninterrupted.⁷ No right to a several fishery in a public navigable river can be presumed from the mere uninterrupted use and enjoyment of the right for more than twenty years in common with others. If a presumption of a grant of such a right in a public navigable river

¹ Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951; Adams v. Pease, 2 Conn. 481; Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333; Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386; Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249.

² Baylor v. Decker, 133 Pa. St. 168, 19 Atl. Rep. 351.

³ Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333.

⁴ Carter v. Murcot, 4 Burr. 2162; Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249; Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493; Delaware & Md. R. Co. v. Stump, 8 Gill. & J. 479, 29 Am. Dec. 561; Chalker v. Dickinson, 1 Conn. 382, 6 Am. Dec. 250; Phipps v. State, 22 Md. 380, 85 Am.

Dec. 654. A license to fish, issued by the state fish commissioner, under the provisions of Laws 1893, p. 15, cannot give the licensee the exclusive right to fish at any designated place. State v. Crawford, 44 Pac. 876, 14 Wash. 373, followed in Morris v. Graham (Wash.) 47 Pac. Rep. 752.

⁵ Sidwell v. Greig, 40 N. Y. Supp. 968.

⁶ Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951; Chalker v. Dickinson, 1 Conn. 382, 6 Am. Dec. 250; Adams v. Pease, 2 Conn. 481; Delaware & Md. R. Co. v. Stump, 8 Gill. & J. 479; Tini-cum Fishing Co. v. Carter, 61 Pa. St. 21, 100 Am. Dec. 597.

⁷ Chalker v. Dickinson, 1 Conn. 382, 6 Am. Dec. 250.

can arise in any case, it must be shown that the use and enjoyment have been in exclusion of the right of others.¹

A right to fish in a pond acquired by long use is a right in the nature of a *profit à prendre in alieno solo*, and is a right in gross belonging only to the individuals who acquired it. It is a mere personal right which cannot be assigned and does not descend to heirs.²

62. The public, as an unorganized body, cannot acquire a right of fishing in a pond owned by an individual, either by grant or prescription, though any individual of the public might obtain the right of fishing in such pond in either of the ways mentioned. A grant to the unorganized public would be void for uncertainty.³ Nor can a large and indefinite class such as "owners and occupiers" claim such right by prescription.⁴

V. License.

63. A license is a personal and revocable privilege to do some act or series of acts upon the land of another without possessing any estate therein.⁵ A parol agreement whereby one landowner has the right to maintain a ditch across the land of another, for the pur-

¹ Delaware & Md. R. Co. v. Stump, 8 Gill. & J. 479.

² Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951.

³ Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951.

⁴ Tilbury v. Silva, 45 Ch. D., 98.

⁵ 3 Kent's Com. 452; De Haro v. United States, 5 Wall. 599.

Alabama: Motes v. Bates, 74 Ala. 374.

California: Wheeler v. West, 71 Cal. 126, 11 Pac. Rep. 871.

Illinois: Forbes v. Balenseifer, 74 Ill. 183; Simpson v. Wright, 21 Ill. App. 67.

Indiana: Parish v. Kaspere, 109 Ind. 586, 10 N. E. Rep. 109; Williamson v. Yingling, 93 Ind. 42; Rogers v. Cox, 96 Ind. 157, 49 Am. Rep. 152.

Iowa: Cook v. Chicago, B. & Q. R. Co., 40 Iowa, 451, 455.

Massachusetts: Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. Rep. 73, 15 Am. St. Rep. 168; Cook v. Stearns,

11 Mass. 533, 537; Owen v. Field, 12 Allen, 457.

Minnesota: Johnson v. Skillman, 29 Minn. 95, 12 N. W. Rep. 149.

New Hampshire: Batchelder v. Hibbard, 58 N. H. 269.

New York: Greenwood Lake & Port J. R. Co. v. New York & G. L. R. Co., 134 N. Y. 435, 31 N. E. Rep. 874; Cronkhite v. Cronkhite, 94 N. Y. 323; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Mendenhall v. Klinck, 51 N. Y. 246; Pierrepont v. Barnard, 6 N. Y. 279; Wolfe v. Frost, 4 Sandf. Ch. 72; Houghtaling v. Houghtaling, 5 Barb. 379; Jackson v. Babcock, 4 Johns. 418.

Wisconsin: Lockhart v. Geir, 54 Wis. 133, 11 N. W. Rep. 245; Thoenke v. Fiedler, 91 Wis. 386, 64 N. W. Rep. 1030.

Wyoming: Metcalf v. Hart, 3 Wyo. 513, 27 Pac. Rep. 900, 31 Pac. Rep. 407, 31 Am. St. Rep. 122, 138.

pose of draining his land, does not create an easement, but a license only which is revocable although the licensee has expended money upon the faith of the agreement; for if the agreement is irrevocable an interest or estate in land is created by it without a written conveyance, "in the teeth of the statute of frauds."¹

If the owner of land erects a building thereon and inserts its timbers into a wall on land of an abutter with his oral permission, this is a license only, which may be revoked at any time before it has grown into a prescriptive right.²

An oral agreement by a landowner permitting another to draw logs across his land for a consideration, is a mere license, revocable at will. It is not a right of way, as this is an interest in the land and can only be created by writing.³

The right to maintain a pond or reservoir upon the land of another is an easement which can only be acquired by grant or prescription.⁴ A permanent right to flow land by the erection and maintenance of a mill-dam cannot be created by parol, for such a right is an interest in the land, and therefore an easement which can only be created by grant.⁵ A permanent right to maintain a drain through the land of another cannot be created by a license even if this be in writing and be made upon a good consideration. It can only be created by a deed or conveyance operating as a grant, and when so created, the right is an easement.⁶

64. A license passes no property in land and no interest in it.

It confers a right, for instance, to go upon one's land when it would be unlawful to do so without a license. "But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground and to carry it away the next day to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to carrying away of the deer killed and tree cut

¹ Thoenke v. Fielder, 91 Wis. 386, 64 N. W. Rep. 1030.

² Hodgkins v. Farrington, 150 Mass. 19, 21, 22 N. E. Rep. 73, 15 Am. St. Rep. 168.

³ Duinnee v. Rich, 22 Wis. 550.

⁴ Bridges v. Purcell, 1 Dev. & B. 492; Johnson v. Skillman, 29 Minn. 95, 12 N. W. Rep. 149.

⁵ Morse v. Copeland, 2 Gray, 302;

Potter v. Chicago & N. W. R. Co., 20 Wis. 533, 91 Am. Dec. 444. And see Carter v. Harlan, 6 Md. 20; Olson v. St. Paul, Min. & Man. R. Co., 38 Minn. 479, 38 N. W. Rep. 490; Woodward v. Seely, 11 Ill. 157, 50 Am. Dec. 445; Tanner v. Volentine, 75 Ill. 624.

⁶ White v. Manhattan R. Co., 139 N. Y. 19, 34 N. E. Rep. 887.

down they are grants.”¹ A license is a mere authority to do certain acts upon the land of another. “A license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful.”² It is distinguished in this respect from an easement.³

If the owner in fee of land grants to another for a term of years “a liberty, license power and authority, to dig, work, mine and search for metals and minerals” in lands described, and to dispose of the ore, metals and minerals that should within that term be there found, paying to the grantor a certain share of such ore, the deed does not amount to a lease but to a license merely, and the grantee is entitled only to such ore as he should find and get, the grantor parting with no estate or interest in the rest. The grantee acquires no interest in the land or in the ore or metals therein, but only a right of property in such ore or metals as he should dig and get out. “That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines or metals or minerals, in the land.”⁴

Where upon a parol partition of land held in common, it was orally agreed that one co-tenant after the division should have the right to enter an orchard set off to the other, and gather one-half of the apples that might grow therein, such agreement was held to amount to a mere license revocable at pleasure, and was revoked by a conveyance of the land upon which was the orchard.⁵

65. An easement is distinguished from a license, though it is often difficult to make out whether a particular case is the one or the other.⁶ There are, however, certain fundamental principles

¹ Thomas v. Sorrell, Vaughan, 344, 351, per Vaughan, C. J., quoted in Wood v. Leadbitter, 13 M. & W. 838, 844, per Alderson, B.

² Thomas v. Sorrell, Vaughan's Rep. 351, per Vaughan, C. J.

³ Howes v. Ball, 7 B. & C. 481; Muskett v. Hill, 5 Bing. N. C. 694; Cook v. Stearns, 11 Mass. 533, 537; Clark v. Glidden, 60 Vt. 702, 15 Atl. Rep. 358; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Houston v. Laffee, 46 N. H. 505; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Wolfe v.

Frost, 4 Sandf. Ch. 72; Selden v. Delaware & H. Canal Co., 29 N. Y. 634; Jackson v. Babcock, 4 Johns. 418; Curtis v. La Grande Hydraulic Water Co., 20 Oreg. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378.

⁴ Doe v. Wood, 2 B. & Ald. 724, 739, per Abbott, C. J. See, also, § 59.

⁵ Taylor v. Millard, 118 N. Y. 244, 23 N. E. Rep. 376.

⁶ 3 Kent's Com. 592. In East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248, 254, the vice-chancellor said: “The adjudications upon this subject are

underlying most of the cases, which enable courts to distinguish an easement from a license, when construed in the light of surrounding circumstances.¹ An easement implies an interest in the land, which a license does not. An easement must be created by a writing or by prescription, while a license may be by parol. An easement is a permanent interest in the realty, while a license, at least so long as it is executory, may be revoked at pleasure.² "An oral license to do any act on the land of another does not trench upon the policy of the law, which requires that contracts respecting any title or interest in real estate shall be by deed or in writing. It gives the licensee no estate or interest in the land. It excuses acts done which would be trespass, or otherwise unlawful."³

A parol license may be shown in evidence as a defence to an action of trespass against the licensee, or to an action for damages for acts which are within the terms of the license.⁴

An instrument which conveys an interest in land for a definite term is not a license but a lease.⁵

66. A license may be implied from circumstances. It may be implied from the acquiescence of a landowner in certain acts or in a series of acts done by another upon his land.⁶

A license to enter upon land and erect buildings is implied in case the person having a possessory right to the land, his title not having been perfected, causes it to be generally understood that he is glad to see buildings and other arrangements put upon the land,

numerous and discordant. Taken in their aggregate, they cannot be reconciled; and, if an attempt should be made to arrange them into harmonious groups, some of them would be found to be so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification."

¹ Nunnally v. Southern Iron Co., 94 Tenn. 397, 29 S. W. Rep. 361.

² 1 Washburn's Real Prop. 629; Washburn's Easements, 6; Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. Rep. 73; Root v. Wadhams, 107 N. Y. 384, 14 N. E. Rep. 281, reversing 35 Hun, 57; Lawrence v. Springer, 49 N. J. Eq. 289, 24 Atl. Rep. 933;

Thoenke v. Fiedler, 91 Wis. 386, 64 N. W. Rep. 1030; Cook v. Chicago, B. & Q. R. Co., 40 Iowa, 451.

³ Hodgkins v. Farrington, 150 Mass. 19, 21, 22 N. E. Rep. 73, per Devens, J.

⁴ French v. Owen, 2 Wis. 250; Lockhart v. Geir, 54 Wis. 133, 11 N. W. Rep. 245.

⁵ New York, C. & St. L. R. Co. v. Randall, 102 Ind. 453, 26 N. E. Rep. 122.

⁶ Martin v. Houghton, 45 Barb. 258; Cutler v. Smith, 57 Ill. 252; Rogers v. Cox, 96 Ind. 157, 49 Am. Rep. 152; Thayer v. Jarvis, 44 Wis. 388; Fletcher v. Evans, 140 Mass. 241, 2 N. E. Rep. 237; Kay v. Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628.

and that he will not treat as trespassers those who erect them and occupy his land.¹

67. A right in the land of another, which is in terms assignable, is intended to be permanent and is annexed to the land of the grantee, is an easement rather than a license. Thus, a grant of the right to use a strip of land for the purposes of “ingress, egress and regress,” and on which the grantee, an ice company, could pass and repass railroad cars containing ice and materials, the only limitation in the grant being that it was not exclusive, and that the right could not be assigned, except to the successors of the grantee in the ice business, is an easement, and not a mere license. “The right in question was created by deed, and is made assignable, because it runs to the ‘ice company, and to their assigns and successors,’ with a limitation upon the power of assignment, restricting it ‘to the successors in, and assigns of, said ice business.’ It was without profit, as nothing was to be taken from the land of the grantor. It was not personal, because succession in title was provided for. Its nature indicates that the parties intended it to be a permanent interest in the land of the grantor, for it was a right of way over a railroad for the purpose of enabling a corporation to carry on a business requiring transportation upon an extensive scale. The business was of such a character that a revocable right might result in irreparable injury to the grantee. The express mention of successors and assigns of the business shows that the parties had in contemplation something more than a temporary expedient, or a merely revocable user. Moreover, the right of way was the only means of communication by land with the railroad upon which the ice company depended for the transportation of its ice to market, and of supplies to its ice-house. The track was laid upon the strip of land leading to the railroad, the right to use it granted, and the ice-house built, all at about the same time, and apparently for the same purpose, as there was no other use for the track. While it is true that no dominant estate is expressly named in the grant, yet one in fact existed, and was named by implication. The grant was to an ice company, for use in its ice business of the right to use a railroad track for the purpose of ingress and egress. Ingress to what, and egress from what? Obviously, the adjoining land on which the ice company had constructed an ice-house and was conducting its ice

¹ Metcalf v. Hart, 3 Wyo. 513, 27 Pac. Rep. 900, 31 Pac. Rep. 407, 31 Am. St. Rep. 122.

business at the date of the grant, and to which it acquired title only three days after the original conveyance of the strip of land in question. * * * That land, therefore, was designed to be, and is, indirectly referred to as the dominant estate, or that to which the right belongs, while the servient estate, or that upon which the burden rests, is directly mentioned.”¹

An instrument granting permission “for all future time” to a manufacturing company to flow obnoxious matter into a certain stream, which describes the land through which the stream flows, as in a certain county, adjacent to the manufacturing company’s works, and is supported by a valuable consideration, is sufficient to create an easement.²

68. A license is a personal privilege and is not assignable.³

An assignment by the licensee does not pass his right.⁴ “If a license ‘be granted to me’” says Sheppard, “to walk in another man’s garden, or to go through another man’s ground, I may not give or grant this to another.”⁵

A license is almost always induced by confidence in the character of the licensee. “A man may well accord a privilege upon his lands to one person, which he would refuse to all others. Hence it is held that a personal license is not assignable, and that an assignment by a licensee determines his right. Though a licensor may be estopped from recalling a privilege granted, the licensee may destroy it. He may abandon or release. He cannot substitute another to his right.”⁶ A writing signed by the owner of a farm, reciting that for a certain consideration he agrees to allow a mining company to pass the muddy water from its ore waters through a stream on his farm so long as the company may wish, is merely a personal license which is not assignable.⁷

¹ Greenwood L. & P. J. R. Co. v. New York & G. L. R. Co., 134 N. Y. 435, 440, 31 N. E. Rep. 874, 47 N. Y. St. Rep. 550, aff’g 28 N. Y. St. Rep. 739, 8 N. Y. Supp. 26, per Vann, J.

² Nunnally v. Southern Iron Co., 94 Tenn. 397, 29 S. W. Rep. 361.

³ Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Emerson v. Fisk, 6 Me. 200; Coney Island & B. R. Co. v. Brooklyn C. Co., 53 Hun, 169; Hull v. Babcock, 4 Johns. 418; Mendenhall v. Klinck, 51 N. Y. 246; Dark v. Johns-

ton, 55 Pa. St. 164, 93 Am. Dec. 732; Fuhr v. Dean, 26 Mo. 116, 119, 69 Am. Dec. 484; Thoenke v. Fiedler, 91 Wis. 386, 64 N. W. Rep. 1030; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287.

⁴ Dark v. Johnston, 55 Pa. St. 164, 171, 93 Am. Dec. 732.

⁵ Touchstone, 239.

⁶ Dark v. Johnston, 55 Pa. St. 164, 93 Am. Dec. 732, per Strong, J.

⁷ Nunnally v. Southern Iron Co., 94 Tenn. 397, 29 S. W. Rep. 361.

A license may, however, be made assignable by express permission; as where a license by indenture was given to one, his executors, administrators and assigns, to search for and raise metals and convert them to the licensee's own use, and there was an express provision that the licensee should have authority to assign by deed.¹

69. At law, and in many States at equity, as well, a parol license is revocable though a consideration has been paid, or expenditures have been made on the faith of it.² Although there are numerous

¹ Muskett v. Hill, 5 Bing. N. C. 964.

² Wood v. Leadbitter, 13 M. & W.

838; Wallis v. Harrison, 4 M. & W. 538; Hewlins v. Shippam, 5 Barn. & C. 221; Bryan v. Whistler, 8 Barn. & C. 288; Fentiman v. Smith, 4 East, 107. The earlier cases to the contrary, Wood v. Lake, Sayers, 3; Tayler v. Waters, 7 Taunt, 374, 384, are overruled.

Colorado: Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786; Ward v. Farwell, 6 Colo. 66.

Connecticut: Foot v. New Haven & N. R. Co., 23 Conn. 214; Collins Co. v. Marcy, 25 Conn. 239; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675.

Delaware: Jackson & S. Co. v. Philadelphia, W. & B. R. Co., 4 Del. Ch. 180.

Illinois: St. Louis Nat. Stock Yards v. Wiggins Ferry Co., 112 Ill. 384, 54 Am. Rep. 243; Tanner v. Volentine, 75 Ill. 628; Kamphouse v. Gaffner, 73 Ill. 453, 461, overruling Russell v. Hubbard, 59 Ill. 335; Simpkins v. Rogers, 15 Ill. 397; Woodward v. Seely, 11 Ill. 157, 50 Am. Dec. 445.

Maine: Seidensparger v. Spear, 17 Me. 123, 35 Am. Dec. 234. The earlier decisions, Ricker v. Kelly, 1 Me. 117, 10 Am. Dec. 38; Clement v. Durgin, 5 Me. 9, are overruled.

Maryland: Carter v. Harlan, 6 Md. 20; Hays v. Richardson, 1 Gill & J 366.

Massachusetts: Morse v. Copeland, 2 Gray, 302; Cook v. Stearns, 11 Mass. 533; Ruggles v. Lesure, 24 Pick. 187; Stevens v. Stevens, 11 Met. 251, 45 Am. Dec. 203; Claflin v. Carpenter, 4 Met.

583, 38 Am. Dec. 381; Nettleton v. Sikes, 8 Met. 34.

Michigan: Wood v. Michigan Air Line R. Co., 90 Mich. 334, 51 N. W. Rep. 263.

Minnesota: Minneapolis Mill Co. v. Minneapolis & St. L. R. Co., 51 Minn. 304, 53 N. W. Rep. 639; Wilson v. St. Paul, M. & M. R. Co., 41 Minn. 56, 42 N. W. Rep. 600; Johnson v. Skillman, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. Rep. 149; Olson v. St. Paul, M. & M. R. Co., 38 Minn. 479, 38 N. W. Rep. 490.

Mississippi: Beck v. Louisville, N. O. & T. R. Co., 65 Miss. 172, 3 So. Rep. 252.

Missouri: Pitzman v. Boyce, 111 Mo. 387, 19 S. W. Rep. 1104; Desloge v. Pearce, 38 Mo. 588. The cases of Fuhr v. Dean, 26 Mo. 116, and Baker v. Chicago, etc., R. Co., 57 Mo. 265, it is believed do not declare a different rule. The latter case was more than a license. Under the decisions of the Supreme Court, the decisions in School District v. Lindsay, 47 Mo. App. 134; Gibson v. St. Louis, A. & M. Asso. 33 Mo. App. 165, and House v. Montgomery, 19 Mo. App. 170, cannot be considered as expressing the law in this State.

New Hampshire: Batchelder v. Hibbard, 58 N. H. 269; Taylor v. Gerrish, 59 N. H. 569; Houston v. Laffee, 46 N. H. 505; Dodge v. McClintock, 47 N. H. 383, 386; Carleton v. Redington, 21 N. H. 291; Marston v. Gale, 24 N. H. 176. The earliest decisions to the contrary, Woodbury v. Parshley, 7 N. Y.

decisions which hold that in equity a parol license becomes irrevocable after the licensee has expended money on the faith of it, these decisions seem opposed to sound law and to the weight of authority, both in America and in England. In a recent decision in New Jersey, Chief Justice Beasley, for the Court of Errors and Appeals, says: "If the principle that licenses of this character are to be, under the conditions in question, treated as irrevocable, the same principle, if logical reasoning is to be maintained, would, of necessity, have to be extended so as to control most of the regulations of the statute of frauds. If a parol license, inefficacious by force of the act, should be rendered efficacious by reason of a losing part performance on the side of the licensee, it would be difficult to refuse, on a like ground, to apply a similar quality to a sale of goods equally within the statutory condemnation. Suppose A, a merchant, should by parol purchase a cargo of merchandise of B, to be delivered at a certain day, and, trusting in such agreement of sale, should, to the knowledge of B, proceed at great expense to procure a vessel and prepare it for the voyage, would such sale be enforceable either at law or in equity? In such case it would not be pretended that by reason of part performance and great loss a practicable equity would arise, and yet how, in point of principle, is such supposed case distinguishable from that of one of these licenses after part performance by the licensee? The fact is, that a statute that renders legal the revocation of certain classes of contracts is founded on the theory

237, 26 Am. Dec. 739; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102, are overruled.

New Jersey: *Hetfield v. Central R. Co.*, 29 N. J. L. 571; *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. Rep. 933, 31 Am. St. Rep. 702; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248.

New York: *Root v. Wadhams*, 107 N. Y. 384, 14 N. E. Rep. 281; *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. Rep. 824; *Miller v. Auburn & S. R. Co.*, 6 Hill, 61; *Thompson v. Gregory*, 4 Johns. 81, 4 Am. Dec. 255; *Mumford v. Whitney*, 15 Wend. 381, 30 Am. Dec. 60; *Wolfe v. Frost*, 4 Sandf. Ch. 72, 90; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *White v. Manhattan*

R. Co., 139 N. Y. 19, 34 N. E. Rep. 887; *Murdock v. Prospect Park R. Co.*, 73 N. Y. 579; *Eggleston v. New York & H. R. Co.* 35 Barb. 162; *Houghtaling v. Houghtaling*, 5 Barb. 379.

North Carolina: *Richmond & D. R. Co. v. Durham & N. E. Co.*, 104 N. C. 658, 10 S. E. Rep. 659; *Bridges v. Purcell*, 1 Dev. & B. 492; *Kivett v. McKeithan*, 90 N. C. 106; *McCracken v. McCracken*, 88 N. C. 272.

Rhode Island: *Foster v. Browning*, 4 R. I. 47, 53, 67 Am. Dec. 505.

Wisconsin: *Thoemke v. Fiedler*, 91 Wis. 386, 64 N. W. Rep. 1030; *Duinen v. Rich*, 22 Wis. 550, where the question was left undecided; *Potter v. Chicago & N. W. R. Co.*, 20 Wis. 533, 91 Am. Dec. 444.

that while, by its force, great losses will many times fall upon promisees, nevertheless such losses must be endured by such sufferers in order that the mass of the community shall be protected against worse disaster.”¹

70. The policy of the rule that a license is revocable although the licensee has acted upon it, and has expended money upon the faith of it, is declared by the Court of Appeals of New York in a recent decision. “There has been much contrariety of decision in the courts of different States and jurisdictions. But the courts in this State have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is nevertheless revocable at the option of the licensor, and this although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the licensor. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable. But to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite a different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed, than to leave it to the chancellor to construe an executed license as a grant depending upon what, in his view, may be equity in the special case.” Accordingly, it was held that a mere verbal license given to an adjoining owner to erect a retaining wall on the licensor’s land is revocable after the erection of the wall.²

¹ *Lawrence v. Springer*, 49 N. J. Eq. 289, 296, 24 Atl. Rep. 933, 31 Am. St. Rep. 702. The case of *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463, 19 N. J. Eq. 142, is referred to, but its applicability to the case before the court was not perceived, for in that case the license was in writing, not by parol. In *Morton Brewing Co. v. Mor-*

ton, 47 N. J. Eq. 158, 20 Atl. Rep. 286, the vice-chancellor follows *Raritan Water Power Co. v. Veghte*, *supra*.

² *Crosdale v. Lanigan*, 129 N. Y. 604, 610, 29 N. E. Rep. 824, per Earl, J. See similar statements as to the policy of the rule in *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243.

71. A railroad company does not acquire any easement upon land by entering under a mere license from the owner and constructing its road; and a purchaser from the licensor after the road had been constructed does not take the land subject to an easement, on the ground that at the time of his purchase the land was subject to a visible incumbrance. The conveyance does not convert the license into an easement; on the contrary the conveyance is a revocation of the license. The owner of the land may revoke the license, and bring ejectment, which the railroad company may, under the statute, convert into condemnation proceedings.¹ In some States, — notably Wisconsin and Illinois, — either by statute or judicial decision, founded on supposed consideration of public policy, a railroad company acquires a permanent easement in the land by virtue of a license to enter, acted upon by the building of its road; and any action by the landowner therefor is in effect an action to recover compensation for the permanent appropriation of the land for railroad purposes.

72. There is no exception to the general rule in favor of a railroad company that a license is revocable at the pleasure of the licensor where it has entered upon land under a parol license and built its road, on the ground that considerations of public policy forbid that the continuous operation of the road should be interrupted.² A common law dedication of land cannot be made to a railroad company for public use for railroad purposes.³

¹ *Minneapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co.*, 58 Minn. 128, 59 N. W. Rep. 983, per Mitchell, J.; *Watson v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 321, 48 N. W. Rep. 1129; *Lamm v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 71, 47 N. W. Rep. 455; *Minneapolis Mill Co. v. Minneapolis, etc., Ry. Co.*, 51 Minn. 304, 53 N. W. Rep. 639; *Wood v. Michigan Air Line R. Co.*, 90 Mich. 334, 51 N. W. Rep. 263; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243; *Richmond & D. R. Co. v. Durham & N. R. Co.*, 104 N. C. 658, 10 S. E. Rep. 659; *Jackson & S. Co. v. Philadelphia, W. & B. R. Co.*, 4 Del. Ch. 180; *Hetfield v. Central R. Co.*, 29 N. J. L. 571; *Beck v. Louisville, N. O. & Tex. R. Co.*, 65 Miss. 172, 3 So. Rep. 252; *Murdock v. Prospect Park & C. I. R. Co.*, 73 N. Y. 579; *Eggleston v. New York & H. R. Co.*, 35 Barb. 162; *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. Rep. 786; see § 83.

That the license cannot be revoked after the railroad company has expended money in the construction of its road, see *Messick v. Midland, R. Co.*, 128 Ind. 81, 27 N. E. Rep. 419; *Campbell v. Indianapolis & V. R. Co.*, 110 Ind. 490, 11 N. E. Rep. 482; *Hornback v. Cincinnati & Z. R. Co.*, 20 Ohio St. 81.

² *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.*, 51 Minn. 304, 53 N. W. Rep. 639, per Mitchell, J.

³ *Watson v. Chicago, M. St. P. R. Co.*, 46 Minn. 321, 48 N. W. Rep. 1129.

The owner of land abutting upon a street may by parol waive his claim to damages against a railroad company which occupies the street for its road. If the road is constructed under the consent of the owner, he cannot afterwards claim damages.¹

Such abutting owner who has no title to the land of the street may, however, be regarded as abandoning his easement in the street, by executing a written license to an elevated railroad company to construct and operate its road through the street.²

A conveyance, however, of a right of way to a railroad company creates an easement or an interest in the land which passes to a grantee or mortgagee of the company, and is not a mere license which is revocable.³

73. A license is revoked ipso facto by the licensor's conveyance of the land,⁴ or by his doing any act which is inconsistent with or prevents the exercise of the license.⁵ It is revoked by the death of the licensor.⁶ A license to a partnership is revoked by its dissolution.⁷ A license is revoked by the commencement of an action for damages by the licensor.⁸

¹ Pratt v. Des Moines N. W. R. Co., 72 Iowa, 249, 33 N. W. Rep. 666, 32 Am. & Eng. R. Cas. 236.

² White v. Manhattan R. Co., 139 N. Y., 19, 34 N. E. Rep. 887.

³ Columbus, H. & G. R. Co. v. Braden, 110 Ind. 558, 11 S. E. Rep. 357; Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co., 134 N. Y. 435, 47 N. Y. St. Rep. 550, aff'g 55 Hun, 606, 8 N. Y. Supp. 26.

⁴ Wallis v. Harrison, 4 M. & W. 538; Hill v. Lord, 48 Me. 83; Carter v. Harlan, 6 Md. 20; Eckerson v. Crippen, 110 N. Y. 585, 18 N. E. Rep. 443; Winne v. Ulster Co. Sav. Inst., 37 Hun, 349; Taggart v. Warner, 83 Wis. 1, 53 N. W. Rep. 33; Rice v. Roberts, 24 Wis. 461; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19; Kamphouse v. Gaffner, 73 Ill. 453; Drake v. Wells, 11 Allen, 141; Hodgkins v. Farrington, 150 Mass. 19, 15 Am. St. Rep. 168; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Min-

neapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co., 58 Minn. 128, 59 N. W. Rep. 983; Johnson v. Skillman, 29 Minn. 95, 12 N. W. Rep. 149; Wilson v. St. Paul, M. & M. R. Co., 41 Minn. 56, 42 N. W. Rep. 600.

⁵ Wood v. Leadbitter, 13 M. & W. 838; Hodgkins v. Farrington, 150 Mass. 19, 21, 15 Am. St. Rep. 168, 5 L. R. A. 209; Simpson v. Wright, 21 Ill. App. 67; Taylor v. Gerrish, 59 N. H. 569.

⁶ De Haro v. United States, 5 Wall, 599; Hodgkins v. Farrington, 150 Mass. 19, 21, 15 Am. St. Rep. 168, 5 L. R. A. 209; Eggleston v. New York & H. R. Co., 35 Barb. 162; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Ruggles v. Lesure, 24 Pick. 187.

⁷ Barksdale v. Hairston, 81 Va. 764.

⁸ Hewlins v. Shippam, 5 B. & C. 221, per Bailey, J.; Lockhart v. Geir, 54 Wis. 133, 11 N. W. Rep. 245; Branch v. Doane, 17 Conn. 412; Mumford v. Whitney, 15 Wend. 380, 30 Am. Dec. 60.

A license cannot be revoked so that the licensee will be liable in trespass for his acts done in pursuance of it.¹

Where, under a parol consent, given for a sufficient consideration by one of two adjoining proprietors, a private road is laid out and opened, one-half upon the lands of each, for the benefit of a third party, the fact that the other proprietor closes up that portion of the road passing over his land does not annul the consent, but it is still operative and effectual to give a right of way over the land appropriated in pursuance thereof, precisely the same as if the other proprietor had left the portion of the road upon his land undisturbed.²

74. A license is irrevocable when it is coupled with a grant ;³ but even in that case it confers no interest in the land. "It may further be observed," says Baron Alderson, "that a license under seal (provided it be a mere license), is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license, it is not an incident to a valid grant, and it is therefore revocable. Thus, a license by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be, as put by Chief Justice Vaughan,⁴ a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land; and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a water-course, to flow on the land of the licensee. In

¹ Fuhr v. Dean, 26 Mo. 116.

² Dempsey v. Kipp, 61 N. Y. 462.

³ Wood v. Manley, 11 Ad. & El. 34; Doe v. Wood, 2 B. & Ald. 724; Hunt v. Rousmanier, 8 Wheat. 174, 203; United States v. Baltimore & O. R. Co., 1 Hughes, 138; Metcalf v. Hart, 3 Wyo.

513, 27 Pac. Rep. 900, 31 Pac. Rep. 407, 31 Am. St. Rep. 122; Miller v. State,

39 Ind. 267; Richmond R. Co. v. Durham & N. R. Co., 104 N. C. 658, 10 S. E. Rep. 659, per Shepherd, J.; Kamphouse, v. Gaffner, 73 Ill. 453, 461; Woodward v. Seely, 11 Ill. 157, 1 Am. Rep. 445.

⁴ Thomas v. Sorrell, Vaughan 330 351.

such a case there is no valid grant of the water-course, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the water-course; and if it did, then the license would be irrevocable."¹

75. An oral license to cut and remove trees, may be revoked by the licensor at any time before the trees are cut; but such revocation does not affect the right of the licensee to remove the trees already cut, but it terminates the license as to the trees then left standing.² As to the trees already severed the license is coupled with and supported by an interest in the property, and to that extent it is not revocable.³

76. A parol license is irrevocable when the conduct of the licensor has been such that the assertion of the legal title would operate as a fraud upon the licensee. Under such condition a license will be held to be irrevocable, even by those courts which adopt the general rule that a parol license is always revocable, though a consideration had been paid or there has been an expenditure of money by the licensee on the faith of the license.⁴

To enforce an oral license in a court of equity there must be a complete and sufficient contract founded not only on a valuable consideration, but its terms must be defined by satisfactory proof accompanied by acts of part performance unequivocally referable to the supposed agreement. The acts of performance must be so clear, definite and certain in their object and design as to refer exclusively to a complete agreement of which they are a part execution.⁵

77. The doctrine that executed licenses become irrevocable was adopted in Pennsylvania at an early day and has been adhered to

¹ Wood v. Leadbitter, 13 M. & W. 838, 845.

² Jones, Real Property, 1606-1609; Giles v. Simonds, 15 Gray, 441, 77 Am. Dec. 373; Cool v. Peters Box & L. Co., 87 Ind. 531; Pierrepont v. Barnard, 6 N. Y. 279; Jenkins v. Lykes, 19 Fla. 148.

³ Giles v. Simonds, 15 Gray, 441, 77 Am. Dec. 373; Hill v. Hill, 113 Mass. 103, 18 Am. Rep. 455; Hill v. Cutting, 113 Mass. 107.

⁴ Minneapolis Mill Co. v. Minneapolis & St. Louis R. Co., 51 Minn. 304, 313, 53 N. W. Rep. 639, per Mitchell, J.

⁵ Cronkhite v. Cronkhite, 94 N. Y. 323, 327, per Miller, J., partly in his language; Wheeler v. Reynolds, 66 N. Y. 227; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Eckerson v. Crippen, 110 N. Y. 585, 18 N. E. Rep. 443.

ever since.¹ A right of way over an alley was sustained as an irrevocable license, where one party had made alterations and improvements on his adjoining property, upon the faith of a mutual understanding as to the use of such alley with the adjoining owner.² Where a license to cast sawdust into a stream was shown to have induced the licensee to build his mill where it was, and in a different place from what he had intended, it was held that the license was irrevocable.³ Where the owners of adjoining lots built a single building covering both lots and the only access to the upper stories was by stairs which were altogether on one lot, it was held that the erection of such building constituted an executed license, in the nature of an easement, on the part of the owner of said lot, allowing the owner of the other lot to use such stairs.⁴

78. In other States also a license for a valuable consideration is regarded as irrevocable when the licensee has incurred expense under it or there is a mutual agreement to do certain acts, and this has been fully performed on one side.⁵ “A license may become

¹ It first appears in *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, 8 Am. Dec. 696, and was followed in *Rerick v. Kern*, 14 Serg. & R. 267, a leading case; *McKillip v. McIlhenny*, 4 Watts, 317, 28 Am. Dec. 711, and *Swartz v. Swartz*, 4 Pa. St. 353, 45 Am. Dec. 697, being possibly carried to its extreme in the latter case; *Ebner v. Stichter*, 19 Pa. St. 19; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23; *Thompson v. McElarney*, 82 Pa. St. 174; *Cleland's App.*, 133 Pa. St. 189, 19 Atl. Rep. 352; *Lacy v. Arnett*, 33 Pa. St. 169; *Huff v. McCauley*, 53 Pa. St. 206. 91 Am. Dec. 203; *Dark v. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732.

² *Ebner v. Stichter*, 19 Pa. St. 19.

³ *Thompson v. McElarney*, 82 Pa. St. 174.

⁴ *Cleland's App.*, 133 Pa. St. 189, 19 Atl. Rep. 352.

⁵ **Alabama:** *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439.

Arkansas: *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190.

California: *McCarthy v. Mut. Relief Asso.*, 81 Cal. 584, 22 Pac. Rep. 933;

Flickinger v. Shaw, 87 Cal. 126, 25 Pac. Rep. 268, 22 Am. St. Rep. 234.

Georgia: *Winham v. McGuire*, 51 Ga. 578; *Rawson v. Bell*, 46 Ga. 19; *Cook v. Pridgeon*, 45 Ga. 331, 12 Am. Rep. 582; *Sheffield v. Collier*, 3 Kelley, 82; *Southwestern R. Co. v. Mitchell*, 69 Ga. 114; *Macon v. Franklin*, 12 Ga. 239.

Indiana: *Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. Rep. 647; *Buchanan v. Logansport, C. & S. R. Co.*, 71 Ind. 265; *Messick v. Midland R. Co.*, 128 Ind. 81, 27 N. E. Rep. 419; *Campbell v. Indianapolis & V. R. Co.*, 110 Ind. 490, 11 N. E. Rep. 482; *Saucer v. Keller*, 129 Ind. 475, 28 N. E. Rep. 1117; *Ferguson v. Spencer*, 127 Ind. 66, 25 N. E. Rep. 1035; *Lane v. Miller*, 27 Ind. 534; *Williamson v. Yingling*, 93 Ind. 42; *Clauser v. Jones*, 100 Ind. 123; *Simons v. Morehouse*, 88 Ind. 391; *Nowlin v. Whipple*, 120 Ind. 596, 22 N. E. Rep. 669, 79 Ind. 481; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Hodgson v. Jeffries*, 52 Ind. 334; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370.

Iowa: *Harkness v. Burton*, 39 Iowa,

an agreement on valuable consideration; as, where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed in specie?

* * * A right under a license when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case the parties might perhaps be thought to be remitted to their former rights."¹

Of course this equitable doctrine does not apply in case a licensee, without consideration, has not acted upon the license, and has incurred no material expense under it; and the license is in such case revocable at the will of the licensor.²

79. A license may be revoked after the licensee has enjoyed the full benefit of his expenditure.³ Thus where one, by permission,

IOWA: Anderson v. Simpson, 21 Iowa, 399; Beatty v. Gregory, 17 Iowa, 109 85 Am. Dec. 546, Wickersham v. Orr, 9 Iowa, 253, 74 Am. Dec. 348; Bush v. Sullivan, 3 G. Greene, 344, 54 Am. Dec. 506.

Nebraska: Gilmore v. Armstrong, (Neb.), 66 N. W. Rep. 998.

Nevada: Lee v. McLeod, 12 Nev. 280.

Ohio: Hornback v. Cincinnati & Z. R. Co., 20 Ohio St. 81; Wilson v. Chalfant, 15 Ohio, 248, 45 Am. Dec. 574.

Oregon: Baldock v. Atwood, 21 Oreg. 73, 26 Pac. Rep. 1058; Curtis v. La Grande Hydraulic Water Co., 20 Oreg. 24, 23 Pac. Rep. 808, 25 Pac. Rep. 378.

Tennessee: Moses v. Sanford, 2 Lea, 655.

Texas: Thomas v. Junction City Irr. Co., 80 Tex. 550, 16 S. W. Rep. 324; Risien v. Brown, 73 Tex. 135, 10 S. W.

Rep. 661; Harrison v. Boring, 44 Tex. 255.

Vermont: Clark v. Glidden, 60 Vt. 702, 15 Atl. Rep. 358; Olmstead v. Abbott, 61 Vt. 281, 18 Atl. Rep. 315; Hall v. Chaffee, 13 Vt. 150; Adams v. Patrick, 30 Vt. 516; Stark v. Wilder, 36 Vt. 752; Pope v. Henry, 24 Vt. 560.

¹ Rerick v. Kern, 14 Serg. & R. 267, 271, 16 Am. Dec. 497, per Gibson, J.

² Parish v. Kaspere, 109 Ind. 586, 10 N. E. Rep. 109; Williamson v. Yingling, 93 Ind. 42; Nowlin v. Whipple, 79 Ind. 481; Ellsworth v. Southern Minn. R. Co., 31 Minn. 543, 18 N. W. Rep. 822; Huff v. McCauley, 53 Pa. St. 206, 91 Am. Dec. 203; Stoddard v. Filgur, 21 Ill. App. 560.

³ Allen v. Fiske, 42 Vt. 462; Morse v. Copeland, 2 Gray, 302; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287.

laid an aqueduct to a spring on the licensor's land, and the aqueduct had decayed and required to be rebuilt to be of any value, the licensor had the right to revoke the license, because the licensee had enjoyed the full benefit of his expenditure, and the revocation would not deprive him of any right.¹

¹ Allen v. Fiske, 42 Vt. 462, and see Clark v. Glidden, 60 Vt. 702, 710, 15 Atl. Rep. 358.

CHAPTER II.

CREATED BY GRANT.

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| I. In general, 80-88. | III. By covenant or condition, 104-117. |
| II. By exception or reservation, 89-103. | IV. Notice to purchaser, 118-125. |

I. *In General.*

80. An easement can be created only by a grant, express or implied, or by prescription, from which a grant is presumed. It is an interest in land within the statute of frauds and cannot be created by parol.¹ Though an oral grant of an easement is within

¹ *Fentiman v. Smith*, 4 East, 107; *Wallis v. Harrison*, 4 M. & W. 538; *Gray*, 302, 305; *Cook v. Stearns*, 11 Mass. 533.

Hewlins v. Shippam, 5 B. & C. 221; *Wood v. Leadbitter*, 13 M. & W. 838; *Adams v. Andrews*, 15 Q. B. 284, 296; *Cocker v. Cowper*, 1 Cr. M. & R. 418.

California: *North Branch & M. R. Co.'s App.*, 32 Cal. 499, 506.

Colorado: *Burlington & C. R. Co. v. Schweikart*, 10 Colo. 178, 183, 14 Pac. Rep. 329; *Ward v. Farwell*, 6 Colo. 66; *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. Rep. 786.

Delaware: *Jackson & Sharp Co. v. Phil. W. & B. R. Co.*, 4 Del. Ch. 180.

Illinois: *Forbes v. Balenseifer*, 74 Ill. 183; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. Rep. 503; *Oswald v. Wolf*, 126 Ill. 542, 19 N. E. Rep. 28.

Indiana: *Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. Rep. 647; *Davidson v. Nicholson*, 59 Ind. 411, 413; *Brumfield v. Carson*, 33 Ind. 94, 5 Am. Rep. 184; *Richter v. Irwin*, 28 Ind. 26.

Kentucky: *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. Rep. 88; *Hall v. McLeod*, 2 Met. 98, 74 Am. Dec. 400.

Massachusetts: *Morse v. Copeland*, 2

Mississippi: *Lanier v. Booth*, 50 Miss. 410; *Bonelli v. Blakemore*, 66 Miss. 136, 5 So. Rep. 228.

New Hampshire: *Tibbetts v. Tibbetts*, 66 N. H. 360, 20 Atl. Rep. 979; *Stevens v. Dennett*, 51 N. H. 324.

New Jersey: *Lawrence v. Springer*, 49 N. J. Eq. 289, 292, 24 Atl. Rep. 933.

New York: *White v. Manhattan R. Co.*, 139 N. Y. 19; *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. Rep. 376; *Pierce v. Keator*, 70 N. Y. 419, 422, 26 Am. Rep. 612; *Post v. Pearsall*, 22 Wend. 425, 433; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Nellis v. Munson*, 108 N. Y. 453, 15 N. E. Rep. 739; *Thompson v. Gregory*, 4 Johns. 81, 4 Am. Dec. 255; *Cayuga R. Co. v. Niles*, 13 Hun, 170, 173; *Day v. New York Cent. R. Co.*, 31 Barb. 548; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Pitkin v. Long Island R. Co.*, 2 Barb. Ch. 221, 47 Am. Dec. 320.

North Carolina: *Cagle v. Parker*, 97 N. C. 271, 2 S. E. Rep. 76.

Pennsylvania: *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203.

the statute of frauds, such a grant may be used to rebut the idea that the user was permissive.¹

An easement can only be created by a deed or by a conveyance operating as a deed. A writing, though executed upon a valuable consideration, is not effectual to create an easement unless it operates as a grant.² "But this is, in effect, merely saying that an easement, being an interest in land, can be created only by grant, the existence of which may be established by production of a deed expressly declaring it, or may be inferred, by construction, from the terms and effect of an existing deed, or evidence of the grant may be derived from its having been so long enjoyed as to be regarded as proof that a grant was originally made, though no deed is produced which contains it. In case of an express grant, the fact of the creation of the easement as well as its nature and extent, is determined by the language of the deed, taken in connection with the circumstances existing at the time of making it."³

81. The only person who can grant a permanent easement is the owner of the land in fee. One who owns an estate less than the fee, such as an equitable estate or an estate for years, cannot, of course, grant a permanent easement, but only an easement to continue during the time his estate may continue. Thus a railroad company holding an agreement under which it may take land for its works during a certain period at a price named, cannot grant a right of way over such land until it has become the proprietor of it. It must own the servient tenement in order to give an easement over it.⁴

A life tenant can create an easement which will continue during his life; but one tenant in common cannot grant an easement which will be binding even as to his interest as against a subsequent grantee *

Rhode Island: *Foster v. Browning*, 4 R. I. 47, 51, 67 Am. Dec. 505.

Tennessee: *Long v. Mayberry*, 96 Tenn. 378, 36 S. W. Rep. 1040; *Nunnally v. Southern Iron Co.*, 94 Tenn. 397, 413, 29 S. W. Rep. 361; *Ferrell v. Ferrell*, 1 Baxt. 329.

Texas: *Texas & P. R. Co. v. Durrett*, 57 Tex. 48.

Wisconsin: *Thoemke v. Fiedler*, 91 Wis. 386; *Rice v. Roberts*, 24 Wis. 461, 465, 1 Am. Rep. 195.

¹ *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. Rep. 88.

² *White v. Manhattan R. Co.*, 139 N. Y. 19.

³ *Lanier v. Booth*, 50 Miss. 410, 413, per Peyton, C. J.

⁴ *Rangeley v. Midland R. Co.*, L. R. 3 Ch. 306, 310; *Gentleman v. Soule*, 32 Ill. 271, 83 Am. Dec. 264; *Harding v. Hale*, 83 Ill. 501; *Gridley v. Hopkins*, 84 Ill. 528; *Kyle v. Logan*, 87 Ill. 64; *Simpson v. Wright*, 21 Ill. App. 67, 74.

In **Wisconsin** a guardian may grant easement upon land of his wards.

² Annot. Stats. 1889, § 3991.

of all the tenants in common.¹ The trustees of an active trust who have the legal title may grant an easement over lands belonging to the trust estate, which will be valid during the life of the trust.²

82. An easement may also be acquired by custom. Custom rests upon local usage, while prescription is an individual claim. "The same rights and privileges which may be claimed as a custom, may also be claimed as a prescription. An easement upon another man's land, such as a right of way, a right to turn a plough upon another man's land, or for a fisherman to mend his nets there, a right to have a gateway, or to pass quit of toll, may be sustained as a custom, or as a prescription. If these rights are common to any manor, district, hundred, parish, or county, as a local right, they are holden as a custom; if the same rights are limited to an individual and his descendants, to a body politic and its successors, or are attached to a particular estate, and are only exercised by those who have the ownership of such estate they are holden, as a prescription, which prescription is either personal in its character, or is a prescription in a *que* estate. In order, therefore, to determine whether rights are holden as a custom, or as a prescription, it is necessary to advert merely to the manner in which they are holden, whether as a local usage, or as a personal claim, or dependent on a particular estate. At the same time, there are certain rights that can be holden but in one way and as a prescription."³

83. An easement is not created by an equitable estoppel except in cases of fraud.⁴ A railroad company, a water company, or an irrigation company, does not gain an easement of way through land by making large expenditures preparatory to entering upon it, while the land owner remained silent. "A land owner may be aware that a railroad company has surveyed the route for a railroad over his land, and has expended large sums of money in grading up to his line, intending to enter his premises and build its road; but he may with impunity remain silent until the attempt is made to enter upon his land, and prevent such attempt by injunction. It would be an anomalous defense on the part of the railroad company that, by his silence, while he saw its survey across his land, and the

¹ Crippen v. Morss, 49 N. Y. 63.

³ Perley v. Langley, 7 N. H. 233, 235,

² Valentine v. Schreiber, 3 N. Y.

per Upham, J. See § 54.

App. Div. 235, 73 N. Y. St. 838, 38 N. Y. Supp. 417.

⁴ Jackson & S. Co. v. Philadelphia W. & B. R. Co., 4 Del. Ch. 180. See §§ 69-76.

great expenditures made in grading to his line, he should be estopped to assert his right to protect himself against invasion. * * * Estoppels *in pais* are the creations of courts of equity, invented to prevent irreparable injury to a party who has been led into a course of conduct in reliance upon the representations of another, which it is inequitable to allow that other to retract; but these rules of equity are not resorted to if other rules of law can be invoked for the relief of the sufferer. Without intending to decide the question here, it is very doubtful if a right will ever be enforced against a party upon the ground of equitable estoppel, where the party claiming the benefit of it can enforce such right under a statutory power independent of estoppel.”¹

A parol contract for an easement, which equity will regard as equivalent to a grant, must be a complete contract for a valuable consideration accompanied by acts of part performance, unequivocally referable to the contract. “There are, no doubt, many cases in which courts recognize an equitable right to an easement without a deed; but there will be found in them either an express agreement for an easement or an acquiescence or consent by conduct which has led to the erecting of permanent works or valuable and lasting improvements, or some other fact which would make the assertion of a legal title operate as a fraud upon the persons setting up the equitable right.”²

84. An oral promise to grant an easement is not sufficient to raise an estoppel in favor of one who has acted upon it. In a case not relating to easements Mr. Justice Gray states a principle which is applicable to this subject:³ “A promise, upon which the statute of frauds declares that no action shall be maintained, cannot be made effectual by estoppel merely because it has been acted upon by the promisee and not performed by the promisor.” To create an easement by estoppel there must be something more than a promise to grant it, even if there was a consideration for the promise, and the promisee has acted upon the promise.⁴

¹ Stewart v. Stevens, 10 Colo. 440, 445, 15 Pac. Rep. 786, per Macon, C.

² Wiseman v. Lucksinger, 84 N. Y. 31, 41, 38 Am. Rep. 479, per Danforth, J. Approved in Cronkhite v. Cronkhite, 94 N. Y. 323. See also Hewlins v. Shippam, 5 B. & C. 221; Cocker v. Cowper, 1 C. M. & R. 418.

³ Brightman v. Hicks, 108 Mass. 246. Quoted and approved in Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786, a case relating to easements.

⁴ §§ 69-79; Cocker v. Cowper, 1 Crompt. M. & R. 418; Johnson v. Skillman, 29 Minn. 95, 12 N. W. Rep. 149.

A parol grant of an easement does not become irrevocable merely because the person entitled to the privilege has entered upon its enjoyment. It is only in case such person has changed his position by the expenditure of money or otherwise so that it would be a fraud on the part of the person who granted the privilege to revoke it that the latter is estopped to do so and the privilege becomes executed and irrevocable.¹

85. Under the equitable doctrine of part performance a verbal agreement for an easement has been enforced by some courts. The owners of adjoining houses being about to rebuild, entered into a verbal agreement, that one of them should pull down a party-wall and rebuild it lower and thinner, and that each party should be at liberty to make a lean-to skylight with the lower end resting on the party-wall. That owner accordingly pulled down and rebuilt the party-wall and erected a lean-to skylight on his side of it as agreed. The other owner also erected a skylight on his side, but instead of a lean-to, so shaped it as to obstruct the access of light to the other's premises more than the agreed lean-to skylight would have done. It was held that the effect of the agreement was to give to each party an easement of light over the other's land; and that one party having performed the agreement on his part was entitled to have it enforced on the part of the other. Mr. Justice Kay, after citing many authorities applicable to cases of easements obtained under parol agreements partly performed, says:² "These authorities seem to me to establish the following propositions: 1. The doctrine of part-performance of a parol agreement, which enables proof of it to be given notwithstanding the statute of frauds, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. 2. Probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing. 3. The most obvious case of part-performance is where the defendant is in possession of land of the

¹ *Forbes v. Balenseifer*, 74 Ill. 183; 300; *Duke of Devonshire v. Eglin*, 14 Beav. 530; *Rochdale Canal Co. v.*

² *East India Company v. Vincent*, 2 Atk. 83; *Anon.*, 3 Eq. Cas. Abr. 522; *Clavering's Case*, in *Jackson v. Cator*, 5 Ves. 688, 690; *Dann v. Spurrier*, 7 Ves. 231; *Powell v. Thomas*, 6 Hare, 300; *King*, 16 Beav. 630; *Cotching v. Bassett*, 32 Beav. 101; *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Plimmer v. Wellington*, 9 App. Cas. 699; *Russell v. Watts*, 10 App. Cas. 590.

plaintiff under the parol agreement. 4. The reason for the rule is that where the defendant has stood by and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the statute. 5. But this reason applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the court would direct to be specifically performed. 6. The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired.'"¹

It is to be observed that eminent judges have regretted the introduction of this equitable doctrine, and have declared that it should not be carried farther than it has been carried by well recognized authorities.²

86. In some States a parol grant of an easement is readily regarded as effectual in equity if it is made upon a valid consideration and there has been such a performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds.³ Thus if one owning land traversed by a stream sells a portion thereof to another, and at the same time gives such other person by parol the right to overflow the remainder of the land by erecting a dam on the land so conveyed, and the purchaser, relying on such parol agreement, erects such a dam, and a mill operated by water, and maintains the same, the parol agreement becomes enforceable. If viewed as a license, the acts of the purchaser render the license irrevocable. If viewed as an easement, they take the grant out of the statute of frauds.⁴

¹ *McManus v. Cooke*, 35 Ch. D. 681, 697. See §§ 77-79.

² 2 Story's Eq. Jur. § 766; *Phillips v. Thompson*, 1 Johns. Ch. 131, Chancellor Kent; *Lindsay v. Lynch*, 2 Sch. & L. 1, 4, Lord Redesdale, L. Ch.; *Cooper v. Carlisle*, 17 N. J. Eq. 525, Chancellor Zabriskie; *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. Rep. 933, *Beasley*, C. J.

³ §§ 77-79; *Gilmore v. Armstrong*, 48 Neb. 92, 66 N. W. Rep. 998; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Johnson v. Lewis*, 47 Ark. 66, 14 S. W. Rep. 466; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Stephens v.*

Benson, 19 Ind. 367; *Steinke v. Bentley*, 6 Ind. App. 663, 34 N. E. Rep. 97; *Robinson v. Thraillkill*, 110 Ind. 117, 10 N. E. Rep. 647; *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. Rep. 109; *Lacy v. Arnett*, 33 Pa. St. 169; *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 546; *Franklin v. Pollard Mill Co.*, 88 Ala. 318, 6 So. Rep. 685; *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. Rep. 717; *Champion v. Munday*, 85 Ky. 31, 2 S. W. Rep. 546; *Harrison v. Boring*, 44 Tex. 255.

⁴ *Newcomb v. Royce*, 42 Neb. 323, 60 N. W. Rep. 552.

If a land owner verbally agrees to convey a railroad company, without charge, a right of way across his land, and the company, relying on his promise, and with his acquiescence, builds across the land, he is estopped to claim damages for the building of the road.¹

One bought a tract of land with a right of way to a public road through other lands of the vendor, and went into possession, but when a deed was tendered to him he refused to receive it because it did not cover the right of way. He finally accepted it, because the vendor stated that if the purchaser would accept the deed he would make another of the right of way. The vendor afterwards refused to make such other deed. It was held that the vendee was entitled to maintain a bill in equity for specific performance and to enjoin the vendor who had interfered with the use of the right of way.²

87. A grant of an easement must contain a sufficient description of the land which is to be subjected to the servitude.³ If the servitude is a right of way, the land over which it is to extend or the way itself must be defined with precision; but when this is done the acceptance of the deed conveying such right of way is an acceptance of the way, and no act is required of him to show his acceptance of it as owner of the dominant tenement.⁴

88. An easement granted in indefinite terms, may be construed in accordance with the uniform acts of the parties continued for many years. Such acts giving a practical construction to the grant will be deemed to express the intention of the parties, and the courts will give it the construction that the parties themselves have put upon it.⁵

¹ Evans v. Gulf, C. & S. F. Ry. Co., 9 Tex. Civ. App. 124, 28 S. W. Rep. 903; Texas & N. O. R. Co. v. Sutor, 56 Tex. 496, 59 Tex. 29; Texas St. L. R. Co. v. Jarrell, 60 Tex. 267; Harrison v. Boring, 44 Tex. 255; Risien v. Brown, 73 Tex. 135, 10 S. W. Rep. 661; Shepard v. Galveston, H. & H. R. Co., 2 Tex. Civ. App. 535, 22 S. W. Rep. 267; Wolf v. Brass, 72 Tex. 133, 12 S. W. Rep. 159.

² Russell v. Napier, 80 Ga. 77, 4 S. E. Rep. 857

³ Nunnally v. Southern Iron Co., 94 Tenn. 397, 29 S. W. Rep. 361.

⁴ Smith v. Worn, 93 Cal. 206, 28 Pac. Rep. 944.

⁵ Hoag v. Place, 93 Mich. 450, 18 L. R. A. 39, 53 N. W. Rep. 617; Mudge v. Salisbury, 110 N. Y. 413, 417, 18 N. E. Rep. 249; Onthank v. Lake Shore & M. S. R. Co., 71 N. Y. 194, 8 Hun, 131, 27 Am. Rep. 35; Evangelical Lutheran Home v. Buffalo Hydraulic Asso., 64 N. Y. 561; Kingsland v. Mayor, 45 Hun, 198.

II. *By Exception or Reservation.*

89. An easement may be created by an exception or reservation in the grantor's deed;¹ though, according to the strict rule of law, an easement, such as a right of way newly created, cannot be made the subject of an exception or reservation because "it is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation."² A reservation, according to strict law, operates by way of an implied grant from the grantee to the grantor. The word "heirs" must, therefore, be used to create an easement in fee.³

90. An easement created by way of exception is not personal, though the word "heirs" be not used, because an exception simply withholds from the grant the estate or rights excepted; and if the grantor owned an estate in fee at the time of the conveyance he continues to own in fee the estate or rights excepted.⁴ An exception, however, may be created by words of reservation, and in determining whether a right is by way of exception or by way of reservation, little reliance can be placed upon the language used; but it is to be considered whether the right is a part of the thing which would have passed by the description, if it were not withheld from the operation of the deed, or whether it is a new right issuing out of the thing granted.⁵

Thus where a grantor reserves the privilege of passing with teams over the granted land to other land of his, and there was a road which he had prepared and used for that purpose, the reservation may be regarded as conferring the benefit of an exception, so that no words of inheritance are necessary.⁶

¹Jones v. Adams, 162 Mass. 224, 38 N. E. Rep. 437; Claffin v. Boston & Albany R. Co., 157 Mass. 489, 32 N. E. Rep. 659; Bowen v. Conner, 6 Cush. 132; Winston v. Johnson, 42 Minn. 398, 45 N. W. Rep. 958.

²Durham & Sunderland Ry. Co. v. Walker, 2 Q. B. 940, 967, per Tindal, C. J.

³Jones, Real Property, §§ 548, 554, 555.

⁴Wood v. Boyd, 145 Mass. 176, 13 N. E. Rep. 476; White v. New York & N. E. R. Co., 156 Mass. 181, 30 N. E. Rep. 612; Claffin v. Boston & A. R.

Co., 157 Mass. 489, 32 N. E. Rep. 659; Bean v. French, 140 Mass. 229, 3 N. E. Rep. 206; White v. Crawford, 10 Mass. 183; Winthrop v. Fairbanks, 41 Me. 307; Smith v. Ladd, 41 Me. 314; Winston v. Johnson, 42 Minn. 398, 45 N. W. Rep. 958; Babcock v. Latterner, 30 Minn. 417, 15 N. W. Rep. 689; Koelle v. Knecht, 99 Ill. 396; Emerson v. Mooney, 50 N. H. 315.

⁵Jones on Real Property, §§ 503-510.

⁶Winthrop v. Fairbanks, 41 Me. 307. To like effect, see Smith v. Ladd, 41 Me. 314; Borst v. Empie, 5 N. Y. 33.

If the plain purpose of the parties to a conveyance is to preserve to the grantor an existing right, and not to create a new one, the fact that the word "reserving" is used, when the word "excepting" should have been used, is of very little importance. The reservation must be construed to be an exception or the provision would be without effect.¹ "Whether, in a given case, the language shall be construed to create an exception or a reservation will depend upon the situation of the property and the surrounding circumstances in the absence of a declaration in the deed by the parties of their intention as to the nature of the right."²

Where there is a reservation of an easement in the land conveyed, the grantor's covenants of freedom from incumbrances and of warranty apply to the estate granted, that is, to the estate subject to the easement reserved.³

91. According to the strict rule of law a reservation by the grantor without the use of the word "heirs" gives him a life estate only.⁴ A reservation vests in the grantor some new right or interest which did not exist in him before, and is in legal effect a regrant from the grantee. Where one conveying a part of his land reserved to himself the privilege of a bridle road in front of his house, this was held to be a reservation and not an exception, because the effect of the clause was to create an easement not before existing. The right which the grantor had to pass over any part of his estate, while he owned the whole of it, was held not to be an existing right of way over the part of the land conveyed.⁵

In a deed to a railroad company of a strip of land for a right of way, a reservation of "the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide,

¹ Wood v. Boyd, 145 Mass. 176, 13 N. E. Rep. 476; White v. New York & N. E. R. Co., 156 Mass. 181, 30 N. E. Rep. 612; Whitaker v. Brown, 46 Pa. St. 197.

² White v. New York & N. E. R. Co., 156 Mass. 181, 185, 30 N. E. Rep. 612, per Morton, J.; Dennis v. Wilson, 107 Mass. 591, 592.

³ Jones v. Adams, 162 Mass. 224, 38 N. E. Rep. 437; Wood v. Boyd, 145 Mass. 176, 13 N. E. Rep. 476. And see Brown v. Bank, 148 Mass. 300, 304, 19 N. E. Rep. 382.

⁴ Durham & S. R. Co. v. Walker, 2 Q. B. 940, 967; Claffin v. B. & A. R. Co., 157 Mass. 489, 32 N. E. Rep. 659; Ashcroft v. Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672; Bean v. French, 140 Mass. 229, 3 N. E. Rep. 206; Jamaica Pond Aqueduct Co. v. Chandler, 9 Allen, 159; Curtis v. Gardner, 13 Met. 457; Hornbeck v. Westbrook, 9 Johns. 73.

⁵ Bean v. French 140 Mass. 229, 3 N. E. Rep. 206

and rising in height to the superstructure of the railroad, to be built and kept in repair by said company," operates as a reservation, and not as an exception, and vests in the grantor an estate for life only. Such a provision clearly indicates that the intention of the parties was to confer upon the grantor a new right not previously vested in him, and which, therefore, could not be the subject of an exception.¹

92. A permanent easement appurtenant to land may be acquired by a grantor by a clause of reservation, when it appears that such was the intention. It is immaterial whether the easement is technically considered as founded on an exception, or reservation, or an implied grant. "When by the construction of a grant it appears that it was the intention of the parties to create or reserve a right in the nature of a servitude in the land granted, for the benefit of other land owned by the grantor, no matter in what form such intention may be expressed, such right, if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass with the lands to all subsequent grantees."² Similar language was used by Mr. Justice Bigelow of the Supreme Court of Massachusetts, saying: "When therefore it appears by a fair interpretation of the words of a grant that it was the intent of the parties to create or reserve a right, in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor, and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land. Cases have arisen where the owner of a large tract of land, for the purpose of providing an area in front of it, to be kept forever open, or securing its permanent use and enjoyment for dwellings and excluding all offensive and noxious trades from the premises, has inserted cove-

¹ Ashcroft v. Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672.

² Coudert v. Sayre, 46 N. J. Eq. 386, 395, 19 Atl. Rep. 190, per Van Fleet, V. C.; Hagerty v. Lee, 54 N. J. L. 580, 25 Atl. Rep. 319, aff'g 26 Atl. Rep. 537; Cooper v. Louanstein

37 N. J. Eq. 284; Newhoff v. Mayo, 48 N. J. Eq. 619, 624, 23 Atl. Rep. 265; Bowen v. Conner, 6 Cush. 132; Mendell v. Delano, 7 Met. 176; Winthrop v. Fairbanks, 41 Me. 307; Karmuller v. Krotz, 18 Iowa, 352.

nants or conditions in his grants, restricting the use of the land conveyed so as to effect these objects. It has been held in such cases, on the grounds just stated, that each grantee of a part of the land subject to such restrictions is bound to observe the stipulations in favor of other grantees of a part of the same land, and is entitled to claim a like observance in his own favor as against them.”¹

The owner of the land on the south side of the lower falls in the outlet of Lake George, and also the bed of the stream, conveyed the bed of the stream to the owners of the land on the north side, reserving to himself, his heirs and assigns, the right to abut a dam on both sides of the stream. The deed was construed as a covenant, as it could have no effect as an exception. “The deed of Schuyler [the owner] did not convey, or profess to convey, any part of the north shore; he could not therefore reserve a right to build a dam against it. But, though void as an exception, the reservation is binding upon the grantees and their assigns, and becomes operative either as an implied covenant or by way of estoppel. The deed is to be construed as though the parties had mutually covenanted that each should have a right to butt a dam upon the shore of the other.”²

93. A reservation of an easement which is intended to be appurtenant to the land retained by the grantor is not within the rule that the word “heirs” must be used to create an estate which will extend beyond the party making the reservation.³ “The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.”⁴

¹ *Whitney v. Union R. Co.*, 11 Gray, 359, 365, 71 Am. Dec. 715, per Bigelow, J. Approved in *Kuecken v. Voltz*, 110 Ill. 264.

² *Case v. Haight*, 3 Wend. 632, 635, *Arthur v. Case*, 1 Paige, 447, per Sutherland, J.

³ *Jones on Real Property*, § 551; *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195, 207, 17 L. R. A. 420; *Peck v. Conway*, 119 Mass. 546; *Hankey v. Clark*, 110 Mass. 262; *Bowen v. Conner*, 6 Cush. 132; *Dennis v. Wilson*, 107 Mass. 591; *Brown v. Thissell*, 6 Cush. 254; *Tuttle v. Walker*, 46 Me. 280; *Herrick v. Marshall*, 66 Me.

435; *Bangs v. Parker*, 71 Me. 458; *Winthrop v. Fairbanks*, 41 Me. 307; *Smith v. Ladd*, 41 Me. 314; *Karmuller v. Krotz*, 18 Iowa, 352; *Kuecken v. Voltz*, 110 Ill. 264; *Koelle v. Knecht*, 99 Ill. 396; *Garrison v. Rudd*, 19 Ill. 558; *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. Rep. 791; *Winston v. Johnson*, 42 Minn. 398, 45 N. W. Rep. 958; *Long v. Fewer*, 53 Minn. 156, 54 N. W. Rep. 1071; *Burr v. Mills*, 21 Wend. 290; *Borst v. Empie*, 5 N. Y. 33; *Witt v. Jefferson*, 13 Ky. L. Rep. 746.

⁴ *Peck v. Conway*, 119 Mass. 546, 549, per Morton, J.

Thus where a grantor reserved the privilege of a right of way and the privilege of drawing water from a ditch which supplied the grantee's mill for the accommodation of the grantor's mill below, the point was made, that the latter stipulation was a bare license to the grantor so long as he might continue to own the mill; but it was held that it was an easement permanently attached to the grantor's mill. The court on this point said: "This claim is in conflict with all the facts of the case. The right to the water is reserved without limitation as to time. It was made for the benefit of the mill below, and manifestly was designed to be appurtenant to it. It would not only be beneficial so long as the grantor should own the mill, but would enhance its value to some extent when sold."¹

94. Whether a right reserved in a deed is a personal right, an easement in gross, or a permanent easement appurtenant to other estate of the grantor, is a question to be determined from the intent of the parties as gathered from the language employed to express it, read in the light of the surrounding circumstances, in case the reservation is without words of inheritance.²

Where one owning two mills on a stream conveyed the upper one, reserving the right to take water from the dam of the upper mill for the necessary accommodation and use of the old shop below, it was objected that the reservation was personal to the grantor and not assignable, the reservation not being to the grantor and his assigns. "Let us for a moment," say the court, "examine the language of the reservation, and see what are the rights of the grantors under that. It is true that the right is reserved to them, without words of inheritance, and without naming their assigns. But it becomes material to enquire for what purpose the reservation was made. It was 'for the necessary accommodation and use of the old shop.' Of this they were the owners in fee simple; and can it be supposed that they meant to limit the use of the water, without which the establishment was of no value, to their own personal occupancy? And can it be believed that such was the intention of the parties to this deed? The idea is opposed to every pre-

¹ Randall v. Latham, 36 Conn. 48, 401, 16 Am. Rep. 46; Winston v. Johnson, 42 Minn. 398, 45 N. W. Rep. 958;

² Russell v. Heublein, 66 Conn. 486, 34 Atl. Rep. 486; Chappell v. New York, N. H. & H. R. Co., 62 Conn. 195, 24 Atl. Rep. 997. 17 L. R. A. 420; Mather v. Chapman, 40 Conn. 382, Karmuller v. Krotz, 18 Iowa, 352; Bowen v. Conner, 6 Cush. 132; Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399; Mendall v. Delano, 7 Met. 176; Borst v. Empie, 5 N. Y. 33.

sumption and to all probability. Are we, then, prevented, by any rigid rule of construction, from giving effect to the intention of the parties? We know of none, and we think this part of the case entirely free from doubt.”¹

Where one conveyed land fronting upon a street and running back to an alley “reserved” by the grantor, but describing the alley and declaring that it was to be used as such and for no other purpose, it was held that the grantee had an easement in the alley as appurtenant to the land conveyed to him. The word “reserved” was regarded as merely descriptive of the alley and as an assurance that the strip of land described as an alley had been set apart by the grantor for alley purposes as appurtenant to, and for the benefit of, the abutting lots into which he was dividing the land.²

That a reservation naturally operates to enhance the value of the grantor’s other lands is a strong indication of his intention that it should be appurtenant to his estate and not merely personal to himself.³ Thus where the owner of lands fronting on a river on which he had a warehouse and landing, conveyed a part to a steam mill company as a site for their mill, reserving to himself, his heirs and assigns, the right to erect and have a warehouse and landing on any part of the granted land, and prohibiting such use of the property by the grantee, it was held that the easement was not personal to the grantor, but appurtenant to the lands he retained and passed to a subsequent purchaser.⁴

95. In case of a reservation of an easement of way without words of inheritance, it does not follow that it is personal merely. “Its character must be determined by the purposes for which the way was intended to be used. Those purposes being ascertained from the terms of the deed, aided, if necessary, by the situation of the property and the surrounding circumstances, the deed is to be construed accordingly. If the apparent purpose was for ingress and egress to and from the grantor’s other land, that stamps the character of the way; and the grantor cannot use it for other purposes, not connected with the occupation of such other land. A way is a means of passage from some place to some other place. A road-

¹ Kennedy v. Scovil, 12 Conn. 317, 341, 83 Am. Dec. 632; Whitney v. Union R. Co., 11 Gray, 359, 71 Am. Dec. 715; Sharp v. Ropes, 110 Mass. 381.

² Long v. Fewer, 53 Minn. 156, 54 N. W. Rep. 1071, per Mitchell, J.

³ Parker v. Nightingale, 6 Allen, ⁴ McMahon v. Williams, 79 Ala. 288.

way or path, which leads to no place or object to which a person has an interest or right to go, is not a way. The rights of the grantor in the way in question here, after he sold his other land and had no right to enter upon it, were reduced to mere nonentity, if they were only personal rights when reserved. Unless appurtenant to the land, his way was a useless *cul de sac*.”¹

Where the owners of a piece of land and a valuable wharf on a navigable river conveyed to a railroad company a right of way for its track through the land, separating the wharf from the land on the other side, they reserved to themselves without words of limitation, the privilege of crossing and recrossing the strip of land conveyed, and afterwards conveyed their remaining land to others who claimed the right of way across the railroad track as indispensable to the use of the wharf. It was held, that the right of way reserved was not an easement in the grantors alone, but was for the benefit of the owners of the wharf lot whoever they might be. “If, in construing the ‘reservation’ in question,” say the court, “We lay out of view the technical rule above mentioned, it is difficult to believe that the parties to the deed intended that the right to cross was only to exist during the lives of the grantors. The situation and needs of the grantor’s premises seem to forbid such a belief. The way at the date of the deed was an existing one, plainly visible, and necessary, and in almost constant use. * * * Then again, if the deed had been silent as to the right to cross, the law would have given an adequate ‘way of necessity’ in favor of the owners of the premises. In the absence of any relinquishment of such a way of necessity in the deed, it is hard to believe that the parties intended, by an express reservation, made under these circumstances, to give to the grantors or allow them to retain a less extensive right than the law would have given if nothing had been said in the deed about the right to cross.”²

96. On the other hand the surrounding circumstances may show that a right of way reserved was a personal, and not a permanent right. Thus where the owners of adjoining lots, called the north and south lot, had recently leased certain sheds on the north side of the south lot for a term of years, and the only access to the street

¹ Dennis v. Wilson, 107 Mass. 591, 593, per Wells, J. And see Lathrop v. H. R. Co., 62 Conn. 195, 202, 24 Atl. Elsner, 93 Mich. 599, 53 N. W. Rep. 791.

² Chappell v. New York, N. H. & Rep. 997, 17 L. R. A. 420, per Torrance, J.

from the sheds was across the rear from the house lot, they, in a subsequent deed of the south lot, subject to said lease, made the following reservation, "reserving a passway for ourselves across said lot herein conveyed." This passway, if appurtenant to the north lot, would seriously injure the value of the south lot. Such a passway was, moreover, unnecessary for the accommodation of the north lot which had a sufficient access to the street in other ways. Moreover, it would be practically impossible to use a passway over the south lot from the north lot except by taking down a brick wall and removing the sheds, and there was no suggestion that the wall was to be taken down or the sheds removed, and they, in fact, had remained ever since. It was held that this reservation, under the circumstances, was to be construed as a reservation of the rights of passway contained by implication in the lease, and not of a permanent right of way appurtenant to the north lot.¹

97. A right of way appurtenant to land conveyed may be granted by a separate deed, notwithstanding the general rule that a right of way does not so pass, unless the grantor in the conveyance uses language sufficient to create an easement anew, or unless the easement is absolutely necessary to the enjoyment of the premises. The rule is to be applied within its spirit, and not upon such a technical construction or application as to defeat the real intent of parties and do injustice. Thus a deed granting a right of way to the owner of a certain lot, "his heirs, assigns, and the tenants and occupiers thereof, at all times, forever," executed on the same day as the deed conveying the lot to him by metes and bounds, creates an easement appurtenant to such lot. "We attach great importance," say the court, "to the fact that the conveyance of the lot and the easement were transactions between the same parties on the same day, and in a way to justify a conclusion that the easement was intended as an appurtenance to the lot."²

98. Whether a reservation of road or way is a reservation of the fee or of an easement depends upon the intention of the parties as shown by the deed in connection with the subject-matter of the deed. Regard may be had in such case to the rule that a deed is always construed in favor of the grantee and against the grantor,

¹ Russell v. Heublein, 66 Conn. 486,
34 Atl. Rep. 486.

² Moll v. McCauley, 83 Iowa, 677,
50 N. W. Rep. 216.

and a reservation in behalf of the latter will not be enlarged beyond the fair and natural import of the language used.¹

A conveyance of a city lot described by metes and bounds "excepting and reserving therefrom a strip of land ten feet wide * * * across the rear or inner end * * * for an alley" passes to the grantee the title to the fee of that part of the lot excepted and reserved, the grantor retaining only an easement of way over the strip.²

A conveyance of a parcel of land, described as bounding on one side on a way of a certain width, passes the title to the center of the way, with an easement of way over the other half of the strip described as a way, and subject to a like easement reserved to the grantor over the half of the way conveyed, in case he is the owner of the land on the opposite side of the way; and subject as well to whatever rights of way existed in others at the time.³

And so where one conveyed land bounded upon one side by a private way "reserving that the said driveway between said houses as now laid out shall remain open and common to all parties having the right to enter thereon," the grantee took title in fee to the center of the driveway, with a right of way over the other half, the half belonging to him being subject to a similar right of way on the part of all parties having the right to enter upon the driveway.⁴

99. The extent of the easement reserved is to be ascertained from a reasonable interpretation of the language of the deed. The use of the easement must be confined strictly to the purposes for which it was created. Thus where one conveyed land reserving the right to draw water by means of a pipe from a well on the land conveyed for the family occupying the grantor's remaining premises, the right reserved is to draw water for the ordinary purposes of a family, but not for the additional use of a bakery.⁵

The extent of the restriction depends not only upon the language of the restriction but upon the intent of it, and for this purpose all the clauses of the deed are to be construed together. A deed of

¹ The Redemptorists v. Wenig, 79 Boston v. Richardson, 13 Allen, 146, Md. 348, 29 Atl. Rep. 667; Winston v. 153; Fisher v. Smith, 9 Gray, 441; Johnson, 42 Minn. 398, 45 N. W. Rep. Lindsay v. Jones, 21 Nev. 72, 25 Pac. Rep. 297.

² Winston v. Johnson, 42 Minn. 398, 45 N. W. Rep. 958. ⁴ Boland v. St. John's Schools, 163 Mass. 229.

³ Lewis v. Beattie, 105 Mass. 410; ⁵ Noyes v. Hemphill, 58 N. H. 536. Stark v. Coffin, 105 Mass. 328, 330;

land "for the purpose of creating proper water wheel and races," containing a provision that "no building is to be erected on said lot that shall materially increase the fire exposure of the building on either side, also no building that shall darken any light within three feet of the west line of said lot," does not restrain the use of the lot to the purposes of a water wheel and races.¹

100. The purpose of a reservation of an easement may determine the rights under it. A reservation in a deed executed by a boom company of a free and unobstructed passage along the banks of said river, and across the land conveyed, for the employes of the grantor, with teams and men, in carrying on said business, a considerable portion of which consisted in removing logs which had floated from the river on which it operated onto adjacent lands, and returning them to the river to be run to their place of destination, is construed to give to the company the right to go upon said land with teams and men and remove the saw-logs which had floated thereon, and place them in said river for the purpose of running them to their destination.²

101. A reservation in a deed cannot create an easement in a stranger to it.³ Thus one cannot reserve a portion of the granted land which he had already conveyed to another; but the reservation may operate as an exception. An exception of a particular lot, or of the rights of a particular person therein, is not repugnant to the grant. An exception is not considered inconsistent with a grant, unless it is so repugnant to it that the grant would be practically inoperative.⁴ "It has been repeatedly held," say the court in *Stockwell v. Couillard*, "that a conveyance of land, reserving or excepting the dower set off to a widow, was a good exception of her interest therein."⁵ The interest set off to the widow is capable of being made certain. So an exception of land taken for a highway,

¹ *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. Rep. 503.

² *Bradley v. Tittabawassee Boom Co.*, 82 Mich. 9, 46 N. W. Rep. 24.

³ *Jones on Real Property*, § 528; *Murphy v. Lee*, 144 Mass. 371, 374, 11 N. E. Rep. 550; *Stockwell v. Couillard*, 129 Mass. 231, 233; *Moulton v. Faught*, 41 Me. 298; *Bridger v. Pierson*, 45 N. Y. 601; *Nellis v. Munson*, 108 N. Y. 453, 461, 15 N. E. Rep. 739;

Ives v. Van Auken, 34 Barb. 566; *Young, Petitioner*, 11 R. I. 636.

⁴ *Jones on Real Property*, § 529; *Stockwell v. Couillard*, 129 Mass. 231; *Sprague v. Snow*, 4 Pick. 54; *Bridger v. Pierson*, 45 N. Y. 601.

⁵ *Canedy v. Marcy*, 13 Gray, 373; *Meserve v. Meserve*, 19 N. H. 240; *Crosby v. Montgomery*, 38 Vt. 238; *Swick v. Sears*, 1 Hill, 17.

or for a railroad, is a valid exception.¹ And where a tract of land was granted, 'except what I have heretofore conveyed to divers persons,' it was held that it conveyed only the lands not previously granted."²

Where the owner of several lots of land conveys one of them with the statement that there is a passageway on the south-easterly side of the said premises which is to be used in common with the abutters thereon, this does not confer any right upon a stranger who owned land on the other side of the passageway from the grantor's land.³

An easement cannot be created by reservation in favor of other land which the grantor had previously conveyed to another and on which he then held a mortgage as security for the purchase-money. The estate of a mortgagee is not one in favor of which an easement can be reserved. The mortgagee holds the legal estate merely for the protection of his interests and when the debt is paid the mortgage is discharged.⁴

102. One can impose no servitude on land he conveys in favor of other land retained by him in derogation of his grant without an express reservation to that effect.⁵ "If a man convey land which is covered by his mill-pond, without any reservation, he loses his right to flow it. There is no room for implied reservation. A man makes a lane across one farm to another which he is accustomed to use as a way; he then conveys the former, without reserving a right of way; it is clearly gone. A man cannot, after he has absolutely conveyed away his land, still retain the use of it for any pur-

¹ Richardson v. Palmer, 38 N. H. 212; Munn v. Worrall, 53 N. Y. 44, 13 Am. Rep. 470.

² Cornwell v. Thurston, 59 Mo. 156. See also Wooley v. Groton, 2 Cush. 305; Forbush v. Lombard, 13 Met. 109; Sawyer v. Coolidge, 34 Vt. 303; Moulton v. Trafton, 64 Me. 218; Young, Petitioner, 11 R. I. 636; Dolan v. Trelevan, 31 Wis. 147; Pettee v. Hawes, 13 Pick. 323; Cook v. Farrington, 10 Gray, 70.

In Griffith v. Rigg (Ky.) 37 S. W. Rep. 58, a grantor reserved a passway to a third person, an adjoining owner, in terms: "Be it known that R. is to have the privilege of a passway from R.'s orchard round to a gate during her

life or [till] she sells." It was held that R. had the right to use the passway during her life, or till she should sell the land occupied by her; and that the privilege extended to the members of her family residing with her, including her husband.

³ Murphy v. Lee, 144 Mass. 371, 11 N. E. Rep. 550.

⁴ Tibbetts v. Tibbetts, 66 N. H. 360, 20 Atl. Rep. 979.

⁵ Sloat v. McDougal, 9 N. Y. Supp. 631; Simmons v. Sines, 4 Abb. Dec. 246, 248; Outerbridge v. Phelps, 13 Abb. N. C. 117, 124, 58 How. Pr. 77, 13 J. & S. 555; Schrymser v. Phelps, 62 How Pr. 1.

pose, without an express reservation. The flowing or the way are but modes of use, and a grantor might as well claim to plough and crop his land.”¹

103. The grantee of land subject to an easement reserved may use the land in such a manner as not to interfere unnecessarily with the enjoyment of the easement. Thus, where the owner of a farm conveyed, to a railroad company, a portion of it, upon which was a spring which he had been accustomed to use for the supply of water for his farm, and in the conveyance he reserved the spring as before used by him, it was held that the title to the land passed to the railroad company subject to the easement, and that it was entitled to use and enjoy the land in all lawful ways not inconsistent with the right reserved to the grantor, and that it was entitled to lay its tracks over the spring on protecting its waters from injury, so as not unnecessarily to interfere with the enjoyment of the easement reserved by the grantor.²

For a small consideration the owner of a farm granted to another the right to dig out and stone up a spring and conduct water therefrom through the grantor's land by a pipe of a specified size to the grantee's house. He warranted this right. This did not render the grantor's whole farm servient to the easement; and it was therefore held that the grantor might lawfully sink another spring only twenty seven feet distant from the granted spring although the effect was to render that spring useless.³

III. *By Covenant or Condition.*

104. While easements are generally acquired by grant or prescription it is also true that they may be acquired by contract, where from the nature of the subject-matter it is evident that the parties intended that privileges designed for the permanent use of the property should form an incident of the principal contract. Thus, a tenant has the right to the enjoyment of such light and air as the building demised was intended to afford as an incident of the hiring, in the nature of an easement.⁴ Where the owners of adja-

¹ Burr v. Mills, 21 Wend. 290, 292, Dec. 157; Atkins v. Bordman, 2 Met. per Cowen, J. 457, 467, 37 Am. Dec. 100.

² Matthews v. Delaware & Hudson Canal Co., 20 Hun, 427. And see also Am. Rep. 157.

³ Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 157.
⁴ O'Neill v. Breese, 3 Misc. Rep. 219, 23 N. Y. Supp. 526.

cent parcels of land lay out a way upon the boundary line for the benefit of their lands by mutual agreement, the way is annexed as an easement to their lands, and by a subsequent conveyance by either, his grantee takes the benefit of the right of way which his grantor had, and holds his land subject to the burden imposed by the agreement of the original owners.¹ The agreement may be enforced in equity by a purchaser from one of such owners, against a purchaser from the other with notice.²

The acceptance of a deed of land containing a recital that, as a part of the consideration, the grantee agreed to open and construct a public way to lead in a certain direction across his land and the land therein conveyed, and to prepare and keep the same open for travel until accepted by the city, operates, by way of reservation or implied grant, to create an easement over the land then conveyed for the benefit of the grantor's remaining land.³

Where the proprietors of adjacent lands by deed agreed that each would appropriate from his land a strip to be used in common for a public street, and conveyances and improvements have been made on the faith that the street would be opened, the agreement may be enforced in equity, whether the public authorities accept the street as dedicated to public use or not.⁴

105. An easement may be created by the word "agree;" as where a deed contained a clause by which the grantors agree that no building shall be erected on their adjoining lot nearer than four feet from the division line, and this right was conferred for the benefit of the land conveyed.⁵ An easement of a private way is created where a grantor "agrees" to open and use as a private alley a specified strip of land across other land belonging to him.⁶ A contract giving one the right to pass over the lands of another is an easement, extending only to a temporary disturbance of the owner's possession.⁷

¹ *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. Rep. 717.

² *Jones on Real Property*, §§ 744-747, 780-782, *Western v. MacDermott*, L. R. 2 Ch. 72; *Hills v. Miller*, 3 Paige, 254; *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713; *Tallmadge v. East River Bank*, 26 N. Y. St. 105; *Shields v. Titus*, 46 Ohio 528, 22 N. E. Rep. 717; *Seegar v. Harrison*, 25 Ohio St. 14.

³ *Hathaway v. Hathaway*, 159 Mass. 584, 35 N. E. Rep. 85.

⁴ *Seegar v. Harrison*, 25 Ohio St. 14.

⁵ *Hogan v. Barry*, 143 Mass. 538, 10 N. E. Rep. 253.

⁶ *Shannon v. Timm*, 22 Colo. 167, 43 Pac. Rep. 1021.

⁷ *Cook County v. Chicago, B. & O. R. Co.*, 35 Ill. 460.

The owner of land through which a railroad was built released the railroad company for a consideration from damages occasioned by a land slide, and at the same time by writing, under seal, agreed, that if further land slides should thereafter occur, he and his heirs and legal representatives would consider the sum paid as full compensation for all future damages. Another land slide having occurred the heir-at-law of such owner sought to recover damages for the injury thereby occasioned. It was held that by virtue of the covenant contained in the agreement the railroad company acquired an easement in the land; and that the heir inherited the land subject to the servitude and could not recover.¹

The instrument was not a grant or a conveyance, but in effect an agreement or covenant not to sue for any damages thereafter occurring; but no reason is apparent why the burden should not be imposed by a covenant, since by its nature it could have been given by grant. The covenant ran with the land and subjected the same, in the hands of the son, to all the burden that it imposed against the father.

106. An easement or servitude may be created by a covenant or condition, if it appears that it was the intention of the parties to create such a right for the benefit of the grantor's other land and the covenant is such that it may be made appurtenant. The doctrine is clearly stated by Vice Chancellor Van Fleet of New Jersey in a recent case:² "That when it appears by the true construction of the terms of a grant that it was the well understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, no matter in what form such purpose may be expressed, whether it be in the form of a condition, or covenant, or reservation, or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burthen thus created and imposed will pass with the lands to all subsequent grantees. And any grantee of the land to which such right is appurtenant acquires, by his grant, a right to have the servitude or easement, or right of amenity, as it is sometimes called, protected in equity, notwithstanding that his right may not rest on a covenant which, as a matter of law runs with the title to his land, and not-

¹ Van Rensselaer v. Albany & W. S. R. Co., 62 N. Y. 65, 3 T. & C. 620, aff'g 395.

² Coudert v. Sayre, 46 N. J. Eq. 386.

³ Hun, 507.

withstanding that it may also be true that he may not be able to maintain an action at law for the vindication of his right.”¹

107. Covenants in restraint of trade cannot be annexed as appurtenant to land, or be regarded as an easement in favor of one tenement imposing a servitude upon another. Such a covenant is personal merely. Thus a covenant by a grantor that neither he nor his assigns will sell any marl from his adjoining land will not be enforced against a purchaser of such land intended to be burdened by such covenant.²

Where one conveyed a few acres of land situated at a railroad junction and covenanted with his grantee that the latter should have exclusive mercantile privileges, and that neither the grantor nor his heirs or assigns would carry on any mercantile business upon the grantor's remaining land—a large tract of nearly four hundred acres—it was held that these covenants did not attach to the grantor's remaining land as running with the land, or as servitudes upon it in favor of the land conveyed to the grantee. Accordingly, the grantor having conveyed a parcel of his remaining land to another, restricting the grantee from any mercantile privileges, and this grantee having conveyed the parcel to another by a general warranty deed without restrictions, it was held that this last grantee could not be restrained from establishing a mercantile business on his land. The court regarded the covenants as purely personal,—not touching the land. “The exclusive right of carrying on a trade upon any

¹ *Joy v. St. Louis*, 138 U. S. 1, 11 S. Ct. Rep. 243; *Coles v. Sims*, 5 De G. M. & G. 1; *Western v. MacDermott*, L. R. 1 Eq. 499, L. R. 2 Ch. 72; *Whitney v. Union Ry. Co.*, 11 Gray, 359, 71 Am. Dec. 715; *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Hogan v. Barry*, 143 Mass. 538, 10 N. E. Rep. 253; *Ladd v. Boston*, 151 Mass. 585, 24 N. E. Rep. 858; *Schworer v. Boylston Market Asso.*, 99 Mass. 285; *Stetson v. Curtis*, 119 Mass. 266; *Bronson v. Coffin*, 108 Mass. 175, 180, 11 Am. Rep. 335; *Barr v. Lamaster*, 48 Neb. 114, 66 N. W. Rep. 1110; *Coudert v. Sayre*, 46 N. J. Eq. 386, 395, 19 Atl. Rep. 190; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Gawtry v. Leland*, 31 N. J. Eq. 385; *Van Rensselaer v. Albany*

& S. R. Co., 62 N. Y. 65, aff'g 1 Hun, 507, 3 T. & C. 620; *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Valentine v. Schreiber*, 3 N. Y. App. D., 235, 73 N. Y. St. 838, 38 N. Y. Supp. 417; *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. Rep. 303; *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Middletown v. Newport Hospital*, 16 R. I. 319, 15 Atl. Rep. 800; *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. Rep. 550.

² *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679. See *Jones on Real Property*, § 737, and cases cited, particularly *Keppell v. Bailey*, 2 Myl. & K. 517, 535

lot is not an easement; and although a covenant not to carry on such trade upon his adjoining property may bind the covenantor, he cannot make it a servitude upon that property so as to burthen it in the hands of purchasers.”¹

108. The covenant or condition may be enforced in equity as a restriction upon the use of the property. “A covenant, though in gross at law, may nevertheless be binding in equity, even to the extent of fastening a servitude or easement on real property, or of securing to the owner of one parcel of land a privilege, or, as it is sometimes called, ‘a right to an amenity’ in the use of an adjoining parcel by which his own estate may be enhanced in value or rendered more agreeable as a place of residence.”²

An agreement under seal between the owners of adjacent lands, that one shall sink a well in the land of another, and shall have access to it and the right to take water from it at all times, creates an easement appurtenant to his land.³

Any restriction of the use of land, not against public policy, and beneficial to the adjacent land of the grantor, whether in the form of a condition, covenant or agreement, may be enforced in equity against the grantee or his assigns with notice.⁴ When adjoining owners of land by grant or mutual covenants impose mutual and corresponding restrictions upon the lands of each, such restrictions are reciprocal easements, the enjoyment of which passes as appurtenant to the land, and the enforcement of which is within the jurisdiction of a court of equity.⁵

109. The words “on condition” do not necessarily create a conditional estate, but as applied to a right of way may be construed as making a reservation of a mere easement of a way. Thus where a deed, conveying for a pecuniary consideration a right of way to a railway company, contains a condition that the railway company shall establish and maintain a reasonable passway and wagon-road across its railroad, but there is nothing further in the deed which is indicative of an intention to make the compliance

¹ Tardy v. Creasy, 81 Va. 553, 563.

³ Warren v. Syme, 7 W. Va. 475.

² Parker v. Nightingale, 6 Allen, 341, 344, 83 Am. Dec. 632, per Bigelow, C. J. To like effect, Whitney v. Union R. Co., 11 Gray, 359, 71 Am. Dec. 715; Barrow v. Richard, 8 Paige, 351, 35 Am. Dec. 713.

⁴ Whitney v. Union R. Co., 11 Gray, 359.

⁵ Wetmore v. Bruce, 118 N. Y. 319, 322, 23 N. E. Rep. 303; Trustees v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615.

with such provision a condition subsequent to the grant, such provision may be construed as a part of the consideration for the deed and as the reservation of a mere easement right.¹

A deed given upon condition that no buildings shall be erected upon the land conveyed other than dwelling-houses, may be enforced in equity as a restriction. If the condition was for the benefit of other land of the grantor, the purchasers of lots out of such land whose property will be injured by a violation of the condition, may maintain a bill in equity without joining the grantor who imposed the condition to prevent a violation of it. "The restriction on the use of the premises contained in the deed operated as a qualification of the fee, and was in the nature of a reservation or exception out of the estate granted."²

110. A covenant by the owner of land to use it or refrain from using it, in a particular manner for the benefit of the owner, of other land is in effect the grant of an easement, and the right to the enjoyment of it will pass as appurtenant to the land for the benefit of which the covenant was made.³ Thus under a covenant not to use certain land for a livery stable the open and notorious use of the premises for such purpose under claim of right for the time sufficient to give title by prescription perfects the right to use the land in violation of the covenant.⁴

An agreement by the grantor in a deed that no building shall be erected on a lot belonging to him adjoining the land conveyed

¹ *Stilwell v. St. Louis & H. Ry. Co.*, 39 Mo. App. 221, 228. "The purpose of the railroad company was to secure the right of way for its road over the grantor's land; the latter was willing to grant this right, provided a private road across the right of way was reserved, and arrangements made for its future maintenance. It is quite evident that neither party intended or expected to make the title to the easement granted depend upon the maintenance of the private road. Such a contract would have been against the interests of the company; and its enforcement, in case of violation, would by no means have restored to the grantor his property in its original condition." Per Biggs, J. See also *Pink-*

hum v. Eau Claire, 81 Wis. 301, 51 N. W. Rep. 550; *Clark v. Martin*, 49 Pa. St. 289.

² *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632, per Bigelow, C. J.; *Ayling v. Kramer*, 133 Mass. 12; *Fuller v. Arms*, 45 Vt. 400.

³ *Jones on Real Property*, §§ 742, 743, and cases cited; *Trustees v. Lynch*, 70 N. Y. 440, 447, 26 Am. Rep. 615, per Allen, J.; *Stephens v. Hockemeyer*, 19 N. Y. Supp. 666; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Peck v. Conway*, 119 Mass. 546; *Whitney v. Union R. Co.*, 11 Gray, 359, 365, 71 Am. Dec. 715; *Herrick v. Marshall*, 66 Me. 435.

⁴ *Stephens v. Hockemeyer*, 19 N. Y. S. 666, 46 N. Y. St. 329.

nearer to that land than a specified distance, creates an easement in the grantee over such land of the grantor. "If the seeming covenant," say, the court, "is for a present enjoyment of a nature recognized by the law as capable of being conveyed and made an easement;—capable, that is to say, of being treated as a *jus in rem*, and as not merely the subject of a personal undertaking,—and if the deed discloses that the covenant is for the benefit of adjoining land conveyed at the same time, the covenant must be construed as a grant, and in the language of Plowden,¹ 'the phrase of speech amounts to the effect to vest a present property in you.' An easement will be created and attached to the land conveyed, and will pass with it to assigns whether mentioned in the grant or not."² Such an easement, however, cannot be made to attach to land which the grantor has already conveyed, although he then holds a mortgage upon it as security for the purchase-money.³

A grantor in conveying certain land in fee granted a right of way in a strip of land adjoining, sixteen feet in width, "to be used by the grantee in common with the grantor, said lane not to be encumbered or built upon by either party." A subsequent purchaser from the grantee erected a building which occupied four feet of the lane. In an action by the owner of the land on the opposite side of the lane it was contended that the easement was not intended to bind other than the immediate parties to the instrument, because the words, "either party," used with reference to encumbering or building upon the lane, referred only to the parties to the deed. It was held, however, that the provision in regard to encumbering the lane, was one running with the land; and that the words "either party" were not used in a restrictive sense, but as including all persons whom the party undertook to represent and bind with himself, that is "his heirs, executors, administrators and assigns."⁴

111. Some easements of this class, which arise from restrictions as to the use of land are termed equitable easements, inasmuch as courts of equity recognize and enforce them. But there are many easements of this class, some of which are herein mentioned, of the enforcement of which, as of easements in general, courts of law have jurisdiction. All the easements here re-

¹ Plowd. 308.

² Tibbetts v. Tibbetts, 60 N. H. 360,

³ Hogan v. Barry, 143 Mass. 538, 10 20 Atl. Rep. 979.

N. E. Rep. 253, per Holmes, J.

⁴ Dexter v. Beard, 130 N. Y. 549, 29 N. E. Rep. 983.

ferred to arise out of covenants and conditions restrictive of the ordinary rights of ownership, and such covenants are termed negative covenants and the easements created are termed negative easements. They have been discussed at length by the author in the chapter of his work on Real Property relating to Restrictions as to the Use of Land, and therefore he does not take them up for further consideration here. Such restrictions generally create easements in favor of the estates for the benefit of which they are made. They run with the land in equity if they are for the permanent benefit of the land, and they are binding upon all who take the servient estate with notice of the restrictions.¹

A limitation in a deed as to the character of the building that may be erected thereon, when made for the benefit of the grantor's adjoining land, creates an easement which will pass as an appurtenance in a deed of such adjoining land, though not expressly mentioned in the deed. The limitation is in the nature of an exception or reservation to the grantor of an incorporeal right in the land granted, and, the reservation being made for the benefit of the adjoining half lot, such right is in the nature of an equitable easement appurtenant to that lot.²

112. An easement is called negative when the owner of the servient tenement is restricted in the exercise of his natural rights of property for the use and benefit of the owner of adjacent land, as the dominant tenement. Such an easement is binding upon the servient tenement for the benefit of the dominant tenement, and passes with it.³ It is an incorporeal hereditament, which like any other easement can be created only by grant or prescription, and not by parol. Thus in a conveyance of land a limitation as to the character of the buildings that may be erected thereon, made for the benefit of the grantor's adjoining land, creates an easement which will pass as appurtenant to such adjoining land.⁴

The owner of land adjoining a railroad conveyed a strip to the company and agreed to erect and did erect on his own lands cattle yards for shipping cattle and he claimed that the company agreed to construct a railroad tract along his land and to run cars over it

¹ Jones on Real Property, §§ 784-801.

² Tinker v. Forbes, 136 Ill. 221, 26 N. E. Rep. 503; Fuller v. Arms, 45 Vt. 400; Ayling v. Kramer, 133 Mass. 12.

³ Herrick v. Marshall, 66 Me. 435; Pitkin v. Long Island R. Co., 2 Barb. Ch. 221, 231, 47 Am. Dec. 320.

⁴ Tinker v. Forbes, 136 Ill. 221, 26 N. E. Rep. 503.

and to deliver and load cars from his cattle yards, to the end that he might enjoy the profits arising from keeping and feeding the stock. The railroad company laid down tracks on the land so conveyed, and performed the agreement for a time, but afterwards refusing to do so, the land owner brought suit. It was held that the contract, if valid, in effect created an easement or servitude, which was to be binding upon the real property of the railroad company, as the servient tenement, for the benefit of the plaintiff and his land, and those who should succeed the plaintiff in his real estate; but that the negative easement acquired by the plaintiff in the lands of the railroad company by virtue of the agreement, was an incorporeal hereditament, the right or title to which could only pass by grant, or deed under seal, or be acquired by prescription; and that the contract on the part of the railroad company being by parol only, was void.¹

An agreement made by a railroad company, with a person owning lands adjacent to the railroad, to establish and maintain a permanent turnout track, and stopping place, at a particular point in the neighborhood of his property, and to stop there with the freight trains and passenger cars of the company, is, in substance, the grant of an easement which is binding upon the property of the railroad company, as the servient tenement, for the benefit of the owner of such adjacent property, and of all those who shall succeed him, in his estate, as owners thereof. And such an agreement, to be valid, must be in writing.²

113. Owners of adjoining lots of land may impose mutual restrictions upon the land of each, and the mutuality of their covenants is a sufficient consideration for their respective grants. Their covenants in such a case are construed as grants of reciprocal easements which may be enforced in equity when the remedy at law is insufficient. Thus, where owners in severalty in adjoining lots, pursuant to an agreement between them, erected thereon buildings, corresponding in size, having the stairs, hallways, skylight and heating apparatus in common, it was held that the agreement was in effect a grant to each of an easement in so much of the stairs, halls and skylight as was situated upon the lot of the other. The easement of each in the property of the other is owned in severalty, and the

¹ Day v. New York Cent. R. Co., 31 Barb, 548.

² Pitkin v. Long Island R. Co., 2 Barb. Ch. 221, 47 Am. Dec. 320.

mere existence of such cross easements does not authorize the partition of such lots at the suit of either party.¹

The owners of lots bounding on Pemberton Square in Boston mutually covenanted that portions of some of the lots should not be built upon, or should not be built upon above a certain height. Afterwards the city took such lots for a site for the new court house. It was held that easements of light, air and prospect were created by the covenant, and that the city was liable in damages to the owner of another lot entitled to the benefit of such easements for their extinguishment.² Mr. Justice Holmes, delivering the opinion, said: "The right to have land not built upon, for the benefit of the light, air, etc., of neighboring land, may be made an easement, within reasonable limits, by deed.³ And such an easement may be created by words of covenant, as well as by words of grant.⁴ In order to attach the easement to the dominant estate, it is not necessary that it should be created at the moment when either the dominant or the servient estate is conveyed, if the purport of the deed is to create an easement for the benefit of the dominant estate.⁵ Of course it does not matter that by the same deed numerous parties grant similar or reciprocal easements over, or in favor of, many parcels of land.⁶ Neither is it material that the indenture provides that a majority of three-fourths of the owners of the lots concerned may terminate the rights which it creates."

Where tenants in common of a parcel of land, laid out in building lots, conveying to a city a strip of land running through it for a highway, covenanted for themselves, their heirs and assigns, that no building should be erected within eight feet of said street, it was held, that the clause was a mutual covenant between the tenants in common, and should be construed as a grant in fee to each of a negative easement in the lands of all, restricting the right to build within the specified limits, which could be enforced between the tenants in common, their heirs and assigns, at law and in equity.⁷

114. A condition that no building shall ever be erected on the granted land does not create a servitude upon it or easement for the

¹ Barr v. Lamaster, 48 Neb. 114, 66 N. W. Rep. 1110.

² Ladd v. Boston, 151 Mass. 585, 24 N. E. Rep. 858.

³ Brooks v. Reynolds, 106 Mass. 31.

⁴ Hogan v. Barry, 143 Mass. 538, 10 N. E. Rep. 253.

⁵ Louisville & Nashville R. Co. v. Koelle, 104 Ill. 455; Wetherell v. Brobst, 23 Iowa, 586, 591.

⁶ Tobey v. Moore, 130 Mass. 448;

Beals v. Case, 138 Mass. 138, 140.

⁷ Greene v. Creighton, 7 R. I. 1.

benefit of adjoining land, unless so intended, and the burden is upon the party claiming that the right is annexed as an appurtenance to his land, to show it. "An easement or servitude of this description ought not to be held to be imposed for the benefit of an adjacent lot of land, in the absence of any words in the grant itself implying it, unless the circumstances and situation at the time of the grant were such as to make it manifest that the condition or restriction or reservation was intended to be for the benefit of such adjacent lot, and to be annexed to it as an appurtenance."¹

In a deed by one having other land and a residence on the same street, a provision that only buildings of a certain class should be built on the granted land, and that they should be set back a certain distance from the street, "with reversion to the grantor, his heirs and assigns, in case of any breach of such condition," is to be regarded as a condition or restriction, which creates an incumbrance on the grantee's land for which he would be liable upon a subsequent conveyance with covenants of warranty and against incumbrances in an action for a breach of the latter covenant. The incumbrance is not in the nature of an easement or servitude in favor of the premises owned and occupied by the original grantor on the same street. The restrictions or conditions inserted in his deed were undoubtedly an advantage to his other land; but for that reason alone these provisions cannot be construed as subjecting the land conveyed to an easement or servitude in favor of such other land. Whether a condition or a restriction, it constitutes an incumbrance.²

115. A purchaser may acquire an easement by an implied covenant, as where a plan by which the land was sold designates the adjoining land of the grantor for certain uses which are an advantage to the land sold. An association owning a large tract of land caused the greater part of it to be laid out and mapped in accordance with a plan of improvement, into lots, streets, avenues and parks. At a sale of lots a lithographic copy of the map was distributed, upon which a portion of the land was marked as "The Ramble," and in this portion ground was marked as a site for a chapel. Purchasers of lots laid out on the map, which was also referred to in the deeds, sought to restrain the association from erect-

¹ Lowell Inst. for Savings v. Lowell, 153 Mass. 530, 533, 27 N. E. Rep. 518, 1890.

² Locke v. Hale, 165 Mass. 20, 42 N. E. Rep. 331, distinguished from Merri-field v. Cobbleigh, 4 Cush. 178.

ing a hotel on the lot marked as a site for a chapel. It was held that as to so much of the land designated on the map as public grounds, or "The Ramble," each purchaser acquired an easement, by implied covenant, as appurtenant to the land purchased, the enjoyment of which the association could not thereafter abridge, and could use for other purposes than a ramble or park. But as to the ground marked on the plan as a site for a chapel, it was held that the mere fact that the proposed building site was designated on the map as a chapel did not of itself constitute an implied covenant that one should be erected, or, if erected, that no other than religious use should be made of it; that without such covenant, either express or implied, the association had the right to devote the structure on that site to some other purpose; and, therefore, in the absence of evidence that the change of use would abridge the enjoyment of the easement acquired by the purchasers, they could not restrain the association from erecting a hotel on the site marked for a chapel. "It is the policy of the law to encourage the most advantageous use of land; and the courts will not be diligent in searching for pretexts with which to check the enterprise of an owner of the fee at the behest of one who is not actually interfered with in the proper enjoyment of his easement."¹

116. A restriction imposed upon the use of the lot of land, conveyed with a covenant that the grantor will impose a restriction upon his remaining lots, inures to the benefit of all the subsequent purchasers of the remaining lots. The covenant is an easement for the benefit of the remaining lots, which a court of equity will enforce.²

All restrictive covenants in equity, are, in effect, very similar to easements, though they are binding upon the owner of the servient estate only in case the latter holds his title in privity with the covenantor or has taken his title with notice of the restrictive covenants.³

117. A covenant by the owner of land with one to whom he transfers no title, that he will not permit a grist mill to be erected thereon, is not a covenant running with the land, binding upon a purchaser from such owner. It is a purely personal contract which in no way burdens the estate of the subsequent grantee.⁴

¹ Johnson v. Shelter Island G. & C. M. Asso., 122 N. Y. 330, 336, 25 N. E. Rep. 484, aff'g 47 Hun, 374. See Jones on Real Property, §§ 747-749.

² Hutchinson v. Ulrich, 145 Ill. 336, 34 N. E. Rep. 556.

³ 1 Jones on Real Property, § 780.

⁴ Harsha v. Reid, 45 N. Y. 415.

And so where the owner of two adjoining lots of land, in conveying one of them, covenants for himself, his heirs, executors, administrators and assigns, that he will not erect on the lot remaining unsold any building which should be regarded as a nuisance, his covenant will be held to be personal and solely against his own acts. He does not agree that his executors, or his administrators, or his assigns shall not build, but only that he would not build.¹

Where land through which an aqueduct pipe had been laid to another lot was conveyed with a covenant against incumbrances, but with a reservation of the privilege of conveying water across the lot, the right to maintain the pipe in the purchaser's land was implied, and was therefore not an incumbrance within the covenant.

IV. *Notice to Purchaser.*

118. The recording acts apply to easements. A purchaser of land subject to a restriction or servitude which appears of record in the line of the title takes subject to it, though he has no actual knowledge of its existence² and the deed to him contains no reference to the servitude.³ A release of an easement by parol agreement is void as to a subsequent purchaser whose deed expressly conveys the easement, unless the purchaser has such notice of the release as prevents his being a purchaser in good faith.⁴

The recording acts apply to easements in gross, for such easements impose a servitude upon the land to which they attach. A subsequent purchaser of such land is not charged therewith unless the instrument creating the easement is recorded or he has notice of it. The record of such instrument operates as constructive notice, because it is an instrument relating to real estate, and this term includes chattels real.⁵

119. A purchaser of land subject to an easement expressly created by grant or reservation in an unrecorded deed is not affected

¹ Clark v. Devoe, 124 N. Y. 120, 26 N. E. Rep. 275.

² Joy v. St. Louis, 138 U. S. 1, 11 S. Ct. 243; Coles v. Sims, 5 De G. M. & G. 1; Whitney v. Union R. Co., 11 Gray, 359, 71 Am. Dec. 715; Peck v. Conway, 119 Mass. 546; Gibert v. Peteler, 38 Barb. 488; Herrick v. Marshall, 66 Me. 435; Shannon v. Timm, 22

Colo. 167, 43 Pac. Rep. 1021; Brewer v. Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679, 18 N. J. Eq. 337; Kirkpatrick v. Peshine, 24 N. J. Eq. 206.

³ Gibson v. Porter (Ky.) 12 Ky. L. Rep. 917, 15 S. W. Rep. 871.

⁴ Snell v. Levitt, 39 Hun, 227.

⁵ Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. Rep. 356.

by it if he had no notice of the servitude.¹ Notice of its existence at the time of the purchase, whether actual, constructive or implied, binds the purchaser.²

The easement of an abutting owner in a street will not be affected by an unrecorded deed by his grantor giving a railroad company permission to lay tracks, if he had no knowledge of such deed at the time of his purchase, and asked in good faith.³

Where one claiming by prescription the right to the use of a well upon land about to be conveyed by deed was present at the execution of the deed, and, knowing its contents, signed the same as a witness without disclosing to the purchaser his claim to the use of the well, he will not be permitted, as against such purchaser, to set up his claim to the use of the well, if the purchaser, being ignorant of the claim, would not have purchased if he had known of it; and it is immaterial that the omission of the person having such claim to disclose it, was only an act of gross negligence and not of bad faith.⁴

120. Of course a purchaser with actual notice of an easement upon the granted land takes the land subject to such easement, though such right does not appear of record as having been created by grant. "If the owner of land enters into a covenant⁵ concerning the land, concerning its use, subjecting it to easements or personal servitudes and the like, and the land is afterwards conveyed or sold to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled, in equity, either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which, in law, 'runs with the land.'"⁶

When the conveyance of an easement is invalid because not made by a deed acknowledged and recorded, the fact that a subsequent purchaser had notice at the time of his purchase of the conveyance

¹ Foote v. Manhattan Ry. Co., 58 Hun, 478, 12 N. Y. Supp. 516; Pentland v. Keep, 41 Wis. 490.

² Christian Moerlein Brewing Co. v. Fasse (Ohio) 24 W. L. Bul. 132; Robinson v. Thrailkill, 110 Ind. 117, 10 N. E. Rep. 647.

³ Varwig v. Cleveland, C. C. & St. L. R. Co., 54 Ohio St. 455, 44 N. E. Rep. 92.

⁴ Stevens v. Dennett, 51 N. H. 324.

⁵ Shannon v. Timm, 22 Colo. 167, 43 Pac. Rep. 1021; Fankboner v. Corder, 127 Ind. 164, 26 N. E. Rep. 766; Robinson v. Thrailkill, 110 Ind. 117, 10 N. E. Rep. 647; Hannefin v. Blake, 102 Mass. 297.

⁶ Willoughby v. Lawrence, 116 Ill. 11, 22, 4 N. E. Rep. 356, per Magruder, J.

of the easement does not affect his right to treat the conveyance as inoperative.¹

121. The servitude must be open and visible to raise a presumption that purchaser of the servient estate bought with actual notice of it.² Thus, if the wall of a house projects fourteen inches upon an adjoining lot, the wall above the ground projecting only seven inches, a purchaser of this lot would not have notice of this projection from a mere inspection of the premises. It would require a survey to determine this fact; and therefore he would not be charged with notice of it as an open and visible servitude.³

Where the owners of adjoining lots built a single building over both lots, and the only access to the upper stories was by stairs which were wholly upon the land of one of the owners, a purchaser of the lot upon which the stairs were, was held to be affected with notice of the license by the mere existence of the building and could not prevent the owner of the other lot from using such stairs.⁴

A purchaser of land through which a railroad company is digging a channel at the time of the conveyance is put upon inquiry as to the authority under which the work is prosecuted. He is affected with a knowledge of all the facts which a prudent inquiry would elicit and must be presumed to have had full knowledge of a contract between his grantor and the railroad company providing for the digging of the channel.⁵

122. The open use and possession of a right of way is sufficient to put a purchaser of the estate over which the way exists upon inquiry. Means of knowledge is equivalent to knowledge.⁶ If a road in which an easement of way is created by deed is visible and open, the easement is binding upon a subsequent purchaser of the servient estate although the deed creating the easement was never recorded.⁷

¹ *Nellis v. Munson*, 108 N. Y. 453, 15 N. E. Rep. 739, reversing 24 Hun, 575.

² *DeLuze v. Bradbury*, 25 N. J. Eq. 70; *Butterworth v. Crawford*, 46 N. Y. 349; *Scott v. Beutel*, 23 Gratt. 1.

³ *Sloat v. McDougal*, 9 N. Y. Supp. 631.

⁴ *Clelland's App.* (Pa. St.) 19 Atl. Rep. 352.

⁵ *Cook v. Chicago, B. & O. R. Co.*, 40 Iowa, 451.

⁶ *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. Rep. 879; *Ague v. Seitsinger*, 85 Iowa, 305, 52 N. W. Rep. 228; *Simmons v. Church*, 31 Iowa, 284, 287; *McCann v. Day*, 57 Ill. 101; *Willoughby v. Lawrence*, 116 Ill. 11, 21, 4 N. E. Rep. 356; *Robinson v. Thraikill*, 110 Ind. 117, 10 N. E. Rep. 647; *Randall v. Silverthorn*, 4 Pa. St. 173; *Preble v. Reed*, 17 Me. 169.

⁷ *Macdonald v. Ferdais*, 22 Can. Sup. Ct. 260.

Where the facts show that the way was a way of necessity, that it was open and visible, and had been used continuously for many years, this constitutes sufficient notice to a purchaser of the existence of the easement.¹

Where, prior to the purchase of land abutting upon a village street, a railway company has, with the consent of the owner of such land, laid in the street in front of the premises purchased a single track of its road, and is operating cars thereon, such condition is notice to the purchaser of a right to maintain such track; and his easement in the street, as owner of abutting land, is, to the extent of such possession and user, affected thereby.²

The lessee of a first floor of an unfinished five-story building knew when he took his lease that the upper stories were intended to be used for mercantile purposes, and that the only access to them was by a stairway and elevators in the hall of the first story. It was held that he took the lease subject to the right of his lessor, his workman and customers to use the hall, stairway and elevators as ways of necessity to such upper stories without any express reservation in the lease.³

123. A purchaser is not bound by non-apparent easements of which he has no notice, actual or constructive. A purchaser of land over which another claims a right of way by agreement with the owner, of which agreement the purchaser has no notice, is not bound by it. One claiming a right of way under a parol license as against a purchaser from the licensor must show a right based on prescription.⁴ The mere existence of a wagon track across the land from another parcel of land to the highway is not notice to the purchaser that the owner of that parcel has a right of way to the highway.⁵

A conveyance by a railroad company of a lot subject to overflow caused by an embankment of the railroad existing at the time of the sale, does not imply a reservation of the right to flood the lot, in case of freshets, by retaining the embankment as it then existed. There is no apparent easement in such a course. The purchaser

¹ Ellis v. Bassett, 128 Ind. 118, 27 N. E. Rep. 344.

² Varwig v. Cleveland. C., C. & St. L. R. Co., 54 Ohio St. 455, 44 N. E. Rep. 92.

³ Benedict v. Barling, 79 Wis. 551, 48 N. W. Rep. 670.

⁴ Barbour v. Pierce, 42 Cal. 657; Taggart v. Warner, 83 Wis. 1, 53 N. W. Rep. 33; Cox v. Leviston, 63 N. H. 283.

⁵ Taggart v. Warner, 83 Wis. 1, 53 N. W. Rep. 33.

might reasonably suppose that the road had been so constructed as not to impede the flow of water.¹

124. One who purchases land, the title to which appears to be clear, takes it free from the incumbrance of a right to maintain aqueduct pipes under ground. Thus, where the owner of two lots of land, one of which was supplied with water by a pipe laid underground across the other from a spring in land of a third person, under a revocable license from him, conveyed the former lot to one person with no mention of water or pipe, and afterwards conveyed the latter lot, covenanting against incumbrances to another, who had no knowledge of the existence of the pipe. Subsequently, the license was revoked, and the lot supplied with water from another source. It was held that there was no implied grant in favor of the former lot to maintain the pipe in the latter lot, and that the grantee of the latter lot took it free from the incumbrance.²

The purchaser of a lot through which there is an underground drain from another lot belonging to the grantor takes it free from this servitude; if he had no knowledge of its existence. The servitude not being a visible one, the purchaser takes the land according to the terms of the deed. He has the right to suppose that the apparent condition is the real condition. A clause in the deed that the purchaser is to have the use of a drain in the rear of the lot leading through other land of the grantor to a street, he contributing proportionately to the expense of keeping the drain in repair, affords no notice that the purchaser's lot is burdened by the servitude of a drain in favor of the grantor's lots farther back from the street named.³

125. The fact, however, that a drain or aqueduct is concealed from sight, does not necessarily prevent its being an "apparent" easement in the sense in which that word is used by jurists.⁴

¹ *Sellers v. Texas Cent. Ry. Co.*, 81 Tex. 458, 17 S. W. Rep. 32.

² *Johnson v. Knapp*, 150 Mass. 267, 23 N. E. Rep. 40, 146 Mass. 70.

³ *Munson v. Reid*, 46 Hun, 399, aff'd in *Treadwell v. Inslee*, 120 N. Y. 458, 24 N. E. Rep. 651, being the same case under another name. See also *Butterworth v. Crawford*, 46 N. Y. 349.

⁴ *Larsen v. Peterson*, 53 N. J. Eq. 88, 92, 30 Atl. Rep. 1094; *Pitney, V. C.*, said: "The aqueduct in *Nicholas v.*

Chamberlain, Cro. Jac. 121; the drain in *Pyer v. Carter*, 1 Hurl. & N. 916; the aqueduct in *Watts v. Kelson*, L. R. 6 Ch. 166; in *Brakely v. Sharp*, 9 N. J. Eq. 9, and 10 N. J. Eq. 207; in *Seymour v. Lewis*, 13 N. J. Eq. 439; and in *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. Rep. 182,—were all buried beneath the surface and not visible to the casual observer; and yet the easement in each case was upheld. The point of actual appearance to the eye was dis-

A water-pipe leading from a driven well in a yard to a sink in the kitchen of a dwelling, there ending in a pump, by which water can be and is habitually drawn from the well to the kitchen for domestic purposes, the well and the water-pipe being completely hidden from view, form an apparent and continuous easement, which will pass with a conveyance of the dwelling alone by the owner of both yard and house, the owner retaining the yard.¹

Whether a purchaser of land through which a gas company had run its pipes, by consent of a former owner, is subject to the easement or not, depends upon whether he had notice of it at the time of purchase, or had notice of facts sufficient to put a reasonable man on inquiry.²

tinctly raised in *Pyer v. Carter*, and overruled. There, as here, the two dwellings were under one roof, and once had a common owner, and had a drain in common for the use of both, which was not visible. Baron Watson, in his considered judgment, used this language: 'We think it was the defendant's own fault that he did not ascertain what easements [the drain] the owner of the adjoining house exercised at the time of the purchase.' Although this case has been severely criticised as to the main ground upon which it was decided, the part of it just

quoted has not been questioned, and the general result was undoubtedly right. See *Tooth v. Bryce*, 50 N. J. Eq. 589, 599, 25 Atl. Rep. 182."

¹ *Larsen v. Peterson*, 53 N. J. Eq. 88, 93, 30 Atl. Rep. 1094. "In the case in hand the controlling fact is that the pump was there visible, and in use, and by its connection with the invisible pipe leading to some fountain the house conveyed to complainant was supplied with water." Per Pitney, V. C.

² *Rome Gas Light Co. v. Meyerhardt*, 61 Ga. 287.

CHAPTER III.

BY IMPLIED GRANT UPON SEVERANCE.

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| I. By implied grant, 126-135. | III. When continuous and apparent,
143-153. |
| II. By implied reservation, 136-142. | |

I. *By Implied Grant.*

126. An implied grant of an easement upon the severance of a tenement, as distinguished from an implied reservation, results from the general rules of construction, that the language of a deed is to be taken most strongly against the grantor, and that a grant of any principal thing shall be taken to carry with it all that is necessary to the grantee for the beneficial enjoyment of the thing granted.

These rules are stated by Chief Justice Shaw, who illustrates them saying:¹ "When therefore a party has erected a mill on his own land, and cut an artificial canal for a raceway, through his own land, and then sells the mill, without the land through which such artificial raceway passes, the right to use such raceway through the grantor's land shall pass as a privilege annexed *de facto* to the mill and necessary to its beneficial use."² Under these rules, it might perhaps be held, that if a man, owning two tenements, has built a house on one, and annexed thereto a drain, passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee. Whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that, as the right of drainage was not reserved in terms, when it naturally would be, if so intended, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably claim to hold his granted estate free of the incumbrance."³

¹ Johnson v. Jordan, 2 Met. 234, 240, 37 Am. Dec. 85; approved in Carbrej v. Willis, 7 Allen, 364, 368, 83 Am. Dec. 688.

² New Ipswich Factory v. Batchelder, 3 N. H. 190, 14 Am. Dec. 346.

³ Leonard v. White, 7 Mass. 8, 5 Am. Dec. 19; Grant v. Chase, 17 Mass. 443, 9 Am. Dec. 161.

The privilege apparently annexed to the estate granted must be of value to it, and the grantee must be presumed to have taken it into consideration as an advantage to such estate and to have paid for it in his purchase.¹ When one contracts for the purchase of a portion of an estate to which an open and visible easement upon the grantor's remaining estate is apparently appurtenant, he is presumed to have contracted with reference to the visible physical condition of the property at the time. But it is not essential that the apparent incidents should be in actual use by the vendor at the time of the sale, in connection with the portion conveyed; knowledge on his part of their existence is sufficient, and this may be shown otherwise than by actual use. When the incidents are open and visible, knowledge of their existence is inferred.² On the other hand, the presumption that the parties contract with reference to the visible condition of the property at the time, may be repelled by actual knowledge on the part of the contracting parties of facts, which negative any deduction to be drawn from the apparent condition.³

It seems quite clear that in cases where the *quasi*-dominant tenement is conveyed an apparent and continuous easement forming a part of the tenement conveyed and adding to its value, passes with conveyance. As was said by Mr. Justice Folger in a case already cited⁴ relating to the right of a purchaser of lands to a flow of water through a ditch, the question for decision was, did the purchaser, "in arriving at the price he would pay, consider and have a right to consider, as an element of the value of the land he was bidding for, this ditch across the tract giving this supply of water through it."

127. The distinction between implied grants and implied reservations of easements is clearly stated by Thesiger, Lord Justice, in a leading case,⁵ in which he states two propositions which he calls the general rules governing cases of this kind. "The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the

¹ *Paine v. Chandler*, 134 N. Y. 385, 32 N. E. Rep. 18, 19 L. R. A. 99; *Curtiss v. Ayrault*, 47 N. Y. 73; *Simmons v. Cloonan*, 81 N. Y. 557, 566, 47 N. Y. 3; *O'Rorke v. Smith*, 11 R. I. 259, 23 Am. Rep. 440; *Henry v. Koch*, 80 N. Y. 391, 44 Am. Rep. 484.

² *Simmons v. Cloonan*, 81 N. Y. 557; *United States v. Appleton*, 1 Sumn. 492.

³ *Simmons v. Cloonan*, 47 N. Y. 3.

⁴ *Curtiss v. Ayrault*, 47 N. Y. 73, 80.

⁵ *Wheeldon v. Burrows*, 12 Ch. D. 31, 49.

grantee all those continuous and apparent easements (by which, of course, I mean *quasi*-easements) or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

“Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation; and that such a distinction between the implied grant and the implied reservation is a mere modern invention, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by and which is to be attributed to Lord Westbury,¹ it appears to me that it has existed almost as far back as

¹ *Suffield v. Brown*, 4 De J. & S. 185.

Lord Justice Thesiger in the case from which the quotation is taken reviews the cases which bear upon this point quite fully. He refers to *Palmer v. Fletcher*, 1 Lev. 122, as supporting his first proposition, though the court was divided upon the other. *Nicholas v. Chamberlain*, Cro. Jac. 121, if it means that the doctrine of implied reservation stands upon the same footing as the doctrine of implied grant, has been overruled again and again; though the decision may be quite right

if limited, as it seems it should be, to easements of necessity, and as indicated in *Tenant v. Goldwin*, 2 Ld. Ray. 1089, 1093, per Lord Holt. In *Swansborough v. Coventry*, 9 Bing. 305, Lord Chief Justice Tindal supports the rule that one conveying property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements. Coming to the case of *Pyer v. Carter*, 1 H. & N. 916, he says that the principles there laid down have been repeatedly overruled, as in *White v. Bass*, 7 H. & N.

we can trace the law upon the subject; and I think it right, as the case is one of considerable importance, not merely as regards the parties, but as regards vendors and purchasers of land generally, that I should go with some little particularity into what I may term the leading cases upon the subject."

In the leading case of *Suffield v. Brown*,¹ in which the case of *Pyer v. Carter* was overruled, Lord Westbury said: "When the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement; and discharges the tenement so sold from any burden imposed upon it during his joint occupancy; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such joint ownership.

722; *Suffield v. Brown*, 4 De G. J. & S. 185, confirmed in *Crossley v. Lightowler*, L. R. 2 Ch. 478. The only case in the Court of Appeal which supports *Pyer v. Carter* is *Watts v. Kelson*, L. R. 6 Ch. 166 174, where Mellish, L. J., made observations during the argument to the effect that the order of conveyance in point of date is immaterial; but the case is no authority to justify the overruling of *Suffield v. Brown*, supported as it is by *Crossley v. Lightowler*.

The broad distinction between an implied grant and an implied reservation has been recognized in all the cases decided since *Wheeldon v. Burrows*. *Ford v. Metropolitan R. Co.'s*, 17 Q. B. D. 12, 27, per Brown, L. J.; *Brown v. Alabaster*, 37 Ch. D. 490, 505, per Kay, J.

In *Bayley v. Great Western R. Co.*, 26 Ch. D. 434, 458, Fry, L. J. said: "It appears to me as a general rule that a person who desires to reserve a right to himself must do so by express words, and there is great difficulty, if not impossibility, in holding that a right of this sort could be reserved by implication."

In *Russell v. Watts*, 25 Ch. D. 559, 572, Cotton, L. J., said: "There is a great difference between an implied grant and an implied reservation. That was very much considered and dealt with by this court in the case of *Wheeldon v. Burrows*. When a man grants a thing he must be considered as granting that which is necessary in the proper sense of the word for the enjoyment of that which he grants, and he cannot derogate from his own grant; he cannot do that which will destroy or render less effectual that which he has granted. But as regards reservation, the matter stands on principle, in my opinion, in a very different position. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle on which an implied grant depends. That principle is, that a grantor shall not derogate from or render less effectual his grant, or render that which he has granted less beneficial to his grantee."

¹ 4 De G. J. & S. 185, 195, 190.

* * * It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant. * * * by the fiction of an implied reservation. If this plain rule be adhered to, men will know what they have to trust, and will place confidence in the language of their contracts and assurances."

128. This distinction is generally recognized in the latest American cases. "As a grantor cannot derogate from his own grant, while a grantee may take the language of the deed most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor, and this distinction explains many of the apparent inconsistencies in the reported cases. Some learned judges, in considering what may be termed an implied grant, as distinguished from an implied reservation, without, however, mentioning the distinction, have used language apparently applicable to all easements existing by implication, when, in fact, intended to be limited to those existing in favor of a grantee. Others, in deciding that an easement was impliedly created by a grant and conveyed to the grantee, have gone farther in their discussions than the point involved required and have broadly declared the rule to be reciprocal and applicable alike to benefits conferred and burdens imposed, provided the marks of either were open and visible."¹

129. The rule is general, that where one conveys a part of his estate he impliedly grants all those apparent or visible easements upon the part retained, which were at the time used by the grantor

¹ Wells v. Garbutt, 132 N. Y. 430, 435, 30 N. E. Rep. 978, per Vann, J. "Such was the case of Lampman v. Milks, 21 N. Y. 506, where the discussion outran the decision, for, while it was decided that, on the facts then appearing, an easement should be implied in favor of the grantee, against the grantor and his remaining lands, it was asserted that under like circumstances an easement would be implied in favor of the grantor, against the grantee and his lands. The latter proposition was involved neither in the case decided, nor in any of those relied upon to support it, except such as have

since been overruled, either expressly or impliedly."

Approved in Paine v. Chandler, 134 N. Y. 385, 32 N. E. Rep. 18. In connection see Sloat v. McDougall, 30 N. Y. St. 912, 9 N. Y. Supp. 631; Mitchell v. Seipel, 53 Md. 251, 36 Am. Rep. 404; Crosland v. Rogers, 32 S. C. 130, 133, 10 S. E. Rep. 874, per Simpson, C. J.; Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688; Randall v. McLaughlin, 10 Allen, 366; Bonelli v. Blakemore, 66 Miss. 136, 5 So. Rep. 228; Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. Rep. 182; Larsen v. Peterson, 53 N. J. Eq. 88, 30 Atl. Rep. 1094.

for the benefit of the part conveyed and which are reasonably necessary for the use of that part.¹ "If without alteration involving labor and expense, the convenience is necessary to the use of the property as it exists at the time of the conveyance, the easement passes. This seems to us the more reasonable doctrine. The reason of the rule in case of an easement implied on account of strict necessity, is that the grantor shall not be permitted to derogate from his grant by denying to the grantee the means by which it is to be enjoyed. For the same reason he should not be permitted to deny the use of open and usable improvements, which, without alterations involving labor and expense, are necessary to the use of the property granted. The estate retained by him being used by him at the time of the grant for the benefit of the other, by means of an obvious artificial convenience and such use being necessary to the enjoyment of the latter in its existing condition, it is to be presumed that he intended to convey the estate, accompanied by the easement."²

Thus where the owner of land flowed by a mill-dam sells the mill and dam and retains the land, the right to flow the land to the

¹ *Brown v. Alabaster*, 37 Ch. D. 490; 47 N. Y. 73, 79; *Parsons v. Johnson*, Russell v. Watts, 25 Ch. D. 559, 572; 68 N. Y. 62, 23 Am. Rep. 149; *Lampman v. Milks*, 21 N. Y. 505.

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California: *Cave v. Crafts*, 53 Cal. 135.

Illinois: *Morrison v. King*, 62 Ill. 30; *Ingals v. Plamondon*, 75 Ill. 118.

Indiana: *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582, 588, 2 N. E. Rep. 188, per Mitchell, C. J.

Maryland: *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404; *Kilgour v. Ashcom*, 5 Har. & J. 82.

Massachusetts: *Johnson v. Jordan*, 2 Met. 234, 37 Am. Dec. 85; *Thayer v. Payne*, 2 Cush. 327; *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *Case v. Minot*, 158 Mass. 577, 582, 33 N. E. Rep. 700.

New Jersey: *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. Rep. 182.

New York: *Spencer v. Kilmer (N. Y.)* 45 N. E. Rep. 865; *Paine v. Chandler*, 134 N. Y. 385, 32 N. E. Rep. 18, 19 L. R. A. 99; *Simmons v. Cloonan*, 81 N. Y. 557, 47 N. Y. 3; *Curtis v. Ayrault*,

Ohio: *Elliott v. Sallee*, 14 Ohio St. 10.
Rhode Island: *Kenyon v. Nichols*, 1 R. I. 411.

South Carolina: *Ferguson v. Witsell*, 5 Rich. L. 280, 57 Am. Dec. 744.

Virginia: *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Hardy v. McCullough*, 23 Gratt. 251.

In **Idaho** it is provided by statute that a transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed. R. S., 1887, § 2926.

² *Howell v. Estes*, 71 Tex. 690, 694, 12 S. W. Rep. 62, per Gaines, J.

extent it was then flowed, without payment of damages, passes by the grant; but when the owner sells the land flowed and retains the mill and dam without reserving the right to flow, he is not protected from the payment of damages.¹

Mr. Justice Story, in a leading case, says: "The general rule of law is, that when a house or store is conveyed by the owner thereof, everything then belonging to, and in use for, the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner, and with the same beneficial rights as were then in use and belonged to it. The question does not turn upon any point as to the extinguishment of any pre-existing rights by unity of possession. But it is strictly a question, what passes by the grant. Thus, if a man sells a mill, which at the time has a particular stream of water flowing to it, the right to the water passes as an appurtenance, although the grantor was, at the time of grant, the owner of all the stream above and below the mill. And it will make no difference, that the mill was once another person's; and that the adverse right to use the stream had been acquired by the former owner, and might have been afterwards extinguished by unity of possession in the grantor. The law gives a reasonable intendment in all such cases to the grant; and passes with the property all those easements and privileges which at the time belong to it, and are in use as appurtenances."²

130. Some instances of the application of this rule are given.

The owner of two adjoining farms, upon one of which was a spring, laid pipes from the spring and conducted the water to a barnyard on the other farm, thus furnishing sufficient water for the stock thereon and for other domestic uses. He afterwards conveyed the farm so supplied by a deed which conveyed the land with appurtenances, but made no mention of the spring or the pipes. He thereafter dug a well upon the farm which he retained a few feet from the spring and from it a ditch running parallel with the pipes. This resulted in lowering the water of the spring below the mouth of the pipes so as to deprive the purchaser of the use of the water. In an action to restrain such interference with the water

¹ Preble v. Reed, 17 Me. 169. And 874; Sloat v. McDougall, 30 N. Y. St. see Sellers v. Texas Cent. R. Co., 81 912, 9 N. Y. Supp. 631.
Tex. 458, 17 S. W. Rep. 32; Crosland
² United States v. Appleton, 1
v. Rogers, 32 S. C. 130, 10 S. E. Rep. Sumn. 492, 500.

of the spring the court found that the uninterrupted flow of the water was essential to the full enjoyment of the estate conveyed; and held that the purchaser was entitled to the relief sought. If the purchaser should be deprived of the use of the water he would lose that which was an open and visible appurtenance to his property, and which represented a part of the consideration which he paid for the farm.¹

A conveyance was made with covenants of warranty and quiet enjoyment of premises consisting of a mill, a dam and a pond which furnished water-power for the mill. At the time of the conveyance the premises were in a certain visible condition in regard to the height of the dam, and yet at that time a right existed in a third person, which he subsequently exercised, to compel the lowering of such dam; the effect being to substantially ruin the water-power, which was the sole consideration for the purchase and the chief value of the property embraced in the conveyance. It was held that the conveyances passed the dam as it stood at its existing and apparent height, and that as the water-power thus created was the essential and material element of value in the mill property which was the subject of the conveyance, there was a breach of the covenant of warranty when it was shown that there was a superior right in a third person to demand a reduction of the height of the dam.²

The owner of a large tract of land drained a marsh upon it, by digging a ditch which carried the water to other portions of the tract, where it made a permanent channel in which the water, gathered in the marsh, flowed in a continuous stream, thus mutually benefiting the lands drained and the lands through which a supply of good water was thereby conveyed. The owner of the property, while these reciprocal benefits and burdens were in existence and apparent, divided the tract into parcels and conveyed the parcels to different grantees who contracted with reference to the then open and apparent condition of the land, and it was held that such condition was essential to the enjoyment of all the lands, and especially to that portion which, by the digging of the ditch, had been drained and made good available land.³ The question for decision in this case was stated by the court to be this: Did the purchaser in arriving at the price he would pay, consider and have a right to con-

¹ *Paine v. Chandler*, 134 N. Y. 385,
32 N. E. Rep. 18, 19 L. R. A. 99.

² *Adams v. Conover*, 87 N. Y. 422,
41 Am. Rep. 381.

³ *Curtiss v. Ayrault*, 47 N. Y. 73.

sider, as an element of value of the land he was buying, this ditch across the tract giving this supply of water through it? In this case upon the division of the estate each part became dominant and each part servient to the other, as their respective needs required.

An owner of two lots built on one of them a house, the cornice of which projected over the other lot. Subsequently the owner sold the house and the land on which it stood. It was held that the right to maintain the cornice could not be controverted by the grantor or those succeeding to his title.¹

131. The rule applies to artificial arrangements which are open and visible though not in actual use, provided the grantor has knowledge of their existence. Thus a lessee of a portion of his lessor's land built fish ponds thereon, as required by the lease, constructing reservoirs and laying pipes on the undemised part, to convey water to the ponds from springs thereon, which afforded the only supply; and the lessor, with knowledge of these reservoirs and pipes, afterwards conveyed the demised premises to the lessee, "with the appurtenances thereto." It was held, that the right to conduct the water to the ponds from the springs on the grantor's other land, by means of the appliance in use at the time of the conveyance, passed to the grantee. The fish ponds having been placed there not only with the owner's knowledge, but also in pursuance of an express provision in the lease, the legal consequences arising from the situation are the same as they would have been had he constructed the work himself. "The thing which the defendant granted was the lot with the fish pond then in use, constituting a very important element in the value of the property. The principal appliances for maintaining it by supplying the water were open and visible, and the defendant knew that there was no reasonable way to maintain it without them."²

132. But only such easements will pass as appurtenant as the grantor had the right to impose on the adjoining land at the time of the conveyance. Thus, where at the time of a conveyance of a

¹ Grace Meth. Epis. Church v. Dobbins, 153 Pa. St. 294, 25 Atl. Rep. 1120, 34 Am. St. 706. The cases in Pennsylvania in which the grantor has conveyed the servient tenement, retaining the dominant, have been decided upon the principle that an easement may be impliedly reserved, contrary to

the doctrine herein advocated, though it is conceded by Mr. Justice Mitchell in the above named case, that the implication in favor of the easement is stronger in the cases of grants.

² Spencer v. Kilmer (N. Y.) 45 N. E. Rep. 865, per O'Brien, J

portion of the grantor's land, "with the appurtenances thereto," a fish pond on the part so conveyed was supplied with water conducted from springs on the adjoining lot by conduits, some of which were on land retained by defendant, and others on land which he had previously conveyed to a third person. Subsequently the grantor regained title to the latter tract, and then diverted the water from the pond by destroying all the conduits. It was held that such act was not unlawful in respect to the conduits on the land not owned by the grantor when the plaintiff took his deed.¹

133. There are instances of correct decisions followed by dicta which have served to produce much confusion on this subject. Where the owner of land across which a stream flowed diverted the stream through an artificial channel so as to relieve a portion of the land formerly overflowed by the stream, and afterwards conveyed that portion to another, it was properly held that neither the grantor nor his grantees of the residue of the land could return the stream to its ancient bed to the damage of the grantee of the portion first conveyed. Under such circumstances the owner, in conveying the portion relieved from overflow, charged the remaining portion of the premises with the servitude of the stream running through that portion.² The *dicta* which seem erroneous are referred to in the note to this section.

¹ Spencer v. Kilmer (N. Y.) 45 N. E. Rep. 865. And see Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531.

² Lampman v. Milks, 21 N. Y. 505. In this case Seldon, J., made some remarks implying that an easement may be implied in favor of the grantor as against the grantee in the same manner and under the same circumstances that are in implication if a grant arises in favor of the grantee against the grantor. The learned judge correctly states the question before him in that part of his opinion in which he says: "The precise question in this case is, whether the owner who, by such an artificial arrangement of the material properties of his estate, has added to the advantages and enhanced the value of one portion, can, after selling that portion with those advantages openly and visibly attached, vol-

untarily break up the arrangement, and thus destroy or materially diminish the value of the portion sold." Then he goes on to make statements not called for in this case, which are not sustained by good authority, and which are here quoted because this and similar statements elsewhere, in the earlier cases fail to recognize the well-settled distinction between implied grants of easements and implied reservations. "No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribution of the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time

134. Implied grants are not favored, however, though more favored than implied reservations; and there are many cases which hold that an easement in other land of the grantor will not be implied, unless this is clearly necessary to the enjoyment of the estate conveyed. "If it is intended that an easement shall pass as one of the appurtenances of an estate, it is very easy to have this intention expressed in the deed. If the deed is silent upon the subject, it is no more than fair to the grantor to presume that he did not so intend; and, to overcome this presumption, to require of the party claiming the easement clear proof that is necessary to the beneficial enjoyment of the estate conveyed to him."¹ Thus, a right of drainage through the grantor's adjoining land will not pass by implication, the deed being silent upon the subject, unless such right is clearly necessary to the beneficial enjoyment of the estate conveyed, though a drain has already been constructed through the adjoining land, and is in use at the time of the conveyance.²

If a deed contains an express grant of an easement, a different or more extended use of the right cannot be implied, although if no

of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right by altering arrangements then openly existing, to change materially the relative value of the respective parts." *Lampman v. Milks*, 21 N. Y. 505, 507, per Selden, J

There is much earlier authority for remarks of the same kind overlooking the distinction between implied grants and implied reservations of easements. In *Nichols v. Chamberlain*, Cro. Jac. 121 (1606), it was resolved as the report reads, that "if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, ex-

cepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereto," etc. In *Tooth v. Bryce*, 50 N. J. Eq. 589, 596, 25 Atl. Rep. 182, the Vice-Chancellor, Pitney, citing this case, remarked: "I stop to say that I am unable to avoid a suspicion that the words 'or sells the land to another, reserving to himself the house,' were not a part of the report when first prepared, but are an interpolation. The context indicates this. For how could the conduit and pipes be said to pass with the house if it was not conveyed, but retained by the grantor? What follows in the way of discussion by the judges upon supposititious cases indicates the same thing."

¹ *Dolliff v. Boston & M. R. Co.*, 68 Me. 173, 176, per Walton, J

² *Dolliff v. Boston & M. R. Co.*, 68 Me. 173. And see *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161; *Lampman v. Milks*, 21 N. Y. 505.

special mention had been made of it, the right to such use would have passed as incident to the property granted.¹

135. A mortgagor in possession may so use the premises as practically to give one parcel an easement and impose a servitude upon another. If then the mortgagee releases to the mortgagor the parcel in favor of which the mortgagor has in effect created an easement by imposing a servitude upon the other, the mortgagee cannot be deemed to have asserted that a servitude shall be imposed upon the parcel still retained under the mortgage. The mortgagee does not convey an easement in favor of the parcel released, but merely discharges the mortgage from that portion.²

One who has mortgaged his land cannot subsequently by grant create an easement in it to the prejudice of the rights of the mortgagee.³

II. *By Implied Reservation.*

136. There is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains, unless the burden is apparent, continuous and strictly necessary for the enjoyment of the land retained. A grantor cannot derogate from his own grant and as a general rule he can retain a right over a portion of his land conveyed absolutely only by express reservation.⁴ "If a man conveys

¹ Hardy v. McCullough, 23 Gratt. 251, approved in Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165.

² Harlow v. Whitcher, 136 Mass. 553. See Scrymser v. Phelps, 33 Hun, 474.

³ Murphy v. Welch, 128 Mass. 489.

⁴ Wheeldon v. Burrows, 12 Ch. D. 31; Crossley v. Lightowler, L. R. 2 Ch. 478; Suffield v. Brown, 4 De G. J. & S. 185; Russell v. Watts, 25 Ch. D. 559, 572; Brown v. Alabaster, 37 Ch. D. 490, 504; Ford v. Metropolitan R. Co., 17 Q. B. D. 12, 27, per Bowen, L. J.; Tootie v. Bryce, 50 N. J. Eq. 589, 25 Atl. Rep. 182; Larsen v. Peterson, 53 N. J. Eq. 88, 30 Atl. Rep. 1094. These New Jersey cases dissent from the earlier cases in this State which had established the doctrine that upon a severance of a tenement, a reservation of a *quasi*-easement will

take place upon the conveyance of the servient part, wherever it would pass by way of grant on the conveyance of the dominant part. See § 141. Burns v. Gallagher, 62 Md. 462; Mitchell v. Seipel, 53 Md. 251, 36 Am. Rep. 404; Warren v. Blake, 54 Me. 276, 289, 89 Am. Dec. 748; Stevens v. Orr, 69 Me. 323; Preble v. Reed, 17 Me. 169; Carbre v. Willis, 7 Allen, 364, 83 Am. Dec. 688; Sullivan v. Ryan, 130 Mass. 116; Wells v. Garbutt, 132 N. Y. 430, 30 N. E. Rep. 978; Outerbridge v. Phelps, 13 Abb. N. C. 117, 13 J. & S. 555; Shoemaker v. Shoemaker, 11 Abb. N. C. 80; Scrymser v. Phelps, 33 Hun, 474; Burr v. Mills, 21 Wend. 290; Sloat v. McDougall, 30 N. Y. St. 912, 9 N. Y. Supp. 631; Scott v. Beutel, 23 Gratt. 1, 7.

land which is covered by his mill pond, without any reservation, he loses his right to flow it. There is no room for implied reservation. A man makes a lane across one farm to another, which he is accustomed to use as a way; he then conveys the former without reserving a right of way; it is clearly gone. A man cannot, after he has absolutely conveyed his land, still retain the use of it for any purpose without an express reservation. The flowing or the way are but modes of use, and a grantor might as well claim to plow and crop the land.”¹ So where the owner of land upon which there was a house, sold the adjoining land absolutely, a portion of which was covered by the wall of the house which was upon the portion of the land retained, it was held that the grantor had no easement in the land sold for the support of the wall of his house.²

It is only in cases of the strictest necessity that the principle of implied reservation can be invoked. This is emphatically declared by the Supreme Court of Maryland: “For the principle is well settled, and it is founded in reason and good sense, that no easement or *quasi*-easement can be taken as reserved by implication, unless it be *de facto* annexed and in use at the time of the grant, and it be shown moreover to be actually necessary to the enjoyment of the estate or parcel retained by the grantor. And such necessity cannot be deemed to exist if a similar way or easement may be secured by reasonable trouble and expense, and especially not if the necessary way or easement can be provided through the grantor’s own property. In order to give rise to the presumption of a reservation of an existing *quasi*-easement or easement where the deed is silent upon the subject, the necessity must be of such strict nature as to leave no room for doubt of the intention of the parties that adjoining properties should continue to be used and enjoyed, in respect to existing easements or *quasi*-easements, as before the severance of ownership; for otherwise parties would never know the real purport of their deeds. If the grantor intends to reserve any right or easement over the property granted, it should be done by express terms, and not afterwards require a plain grant, it may be for full consideration, to be limited and cut down by any mere implied reservation of privileges over the property granted. It is only in cases of the strictest necessity, and where it would not be reasonable to suppose

¹ Burr v. Mills, 21 Wend. 290, 292, per Cowen, J

² Sloat v. McDougall, 30 N. Y. St. 912, 9 N. Y. Supp. 613.

that the parties intended the contrary, that the principle of implied reservation can be invoked.”¹

137. The fact that one has been in the habit of using certain land in connection with his adjoining premises does not create an easement upon the first named land, which upon a conveyance or device of that land, without words of exception or reservation, will be annexed to such other premises. A devise of the land so used “subject to all encumbrances thereon” does not indicate that the land is subject to any servitudes in favor of the testator’s other land, nor is such an encumbrance indicated by the fact that the testator devised the remaining land to two persons in severalty and imposed an easement on each part for the benefit of the other. On the contrary, it is reasonable to suppose that if the testator had intended to impose upon this lot a privilege similar to that imposed upon the other lots he would have so expressed himself.²

138. There are, however, some recognized exceptions to the rule against implied reservations of easements. Lord Justice Cotton states these with clearness and force, saying: “Where the easement of which the reservation is claimed is a mutual easement required for the grantor, as where there is a grant of a house by the owner of two adjoining houses which mutually support each other, there the easement is mutual, and, as there is an implied grant of the easement, so there is an implied reservation of a similar easement in favor of the grantor. So again where there is existing at the time that which is said to be a continuous easement, and of necessity — not an easement strictly, but that which is in the nature of an easement — as a way of necessity; of that there is or may be an implied reservation. Take the common case of a man having a field, which he does not sell, in the midst of land which he sells; of course it is implied that he intends to have the power of using the field not sold, and not to give the exclusive right or control over it to the person to whom he sells the surrounding land, and a way over that is said to be a way of necessity, and that is reserved without express words as an implied reservation. There is another case which is referred to,

¹ Burns v. Gallagher, 62 Md. 462, 471, Dec. 688; Dolliff v. Boston & M. Co., per Alvey, C. J. And see Thayer v. 68 Me. 173; Stevens v. Orr, 69 Me. 323; Payne, 2 Cush. 327; Randall v. Mc- Stillwell v. Foster, 80 Me. 333, 14 Atl. Laughlin, 10 Allen, 366; Johnson v. Rep. 731.
Jordan, 2 Met. 234, 37 Am. Dec. 85; ² Sullivan v. Ryan, 130 Mass. 116.
Carbrey v. Willis, 7 Allen, 364, 83 Am.

but it does not come within that exception; in fact, it is an example of the very strong way in which the courts insist upon the principle that a grantor shall not derogate from his own grant. I refer to the case where there are several grants, not absolutely at the same moment, but so far at the same moment that they are to be considered as one transaction, and done at the same time; then each of the grantees gets the benefit of an implied grant of easements. It is said that that is a reservation. It really is not a reservation, but in order to make all those grants which are looked upon as one transaction available and effectual, it is considered that each of the grantees is to be looked upon as taking from the grantor, while he has still the power to give it, what it is right that he should get; so that there is an implied grant against all the other grantees of those easements which will be reasonably necessary for the property which is conveyed.”¹

139. When the conveyances of the dominant and servient estates are made simultaneously, the existence of the easement will depend upon the attendant circumstances. Thus, where the owner of two adjoining lots and houses, one of which he occupied and the other of which he leased, constructed a drain, from the lot which he leased through that which he occupied, into a common sewer and permitted his tenants to use it for ten years and more, and then sold both lots on the same day to different purchasers; and in his deed to the purchaser of the lot which he formerly leased made no mention of the drain, it was held that such purchaser acquired no right by the deed to the use of the drain through the other lot of land, if by reasonable labor and expense he could make a drain without going through that land. Chief Justice Shaw, delivering the judgment, said: “Here was a division of these two tenements intimately connected with each other, with detailed provisions in respect of the rights which each should have in the other, and the duties to which each should be subject in favor of the other. If it was intended that one should have a perpetual right of drainage through the other, with a right of entry at all times to repair and relay such drain, especially where it is found not to be necessary to the enjoyment of the estate granted, it seems reasonable to suppose that it would have been expressed. As no such right was expressed, we are of opinion that it was not intended to be granted; and as it was not necessary to

¹ Russell v. Watts, 25 Ch. Div. 559, 572, 573.

the enjoyment of the estate, and had not been *de facto* annexed, so as to pass by general words as parcel of the estate, it did not pass to the defendant's grantor by force of the deed."¹

The legal effect, however, of simultaneous conveyances of parts of an estate is to pass to each grantee all those apparent and continuous easements which are necessary to the enjoyment of the granted premises. There is a grant and no implied reservation, so that all such cases are brought within the rule considered in the first division of this chapter.²

140. A partition of real estate carries with it by implication any continuous easement reasonably necessary for the enjoyment of each part, which had been plainly and obviously enjoyed before partition. Such an easement is appurtenant to the parcels into which the land is severed by the partition. A partition is a simultaneous conveyance.³

An easement in one parcel and a servitude in another, arising during their ownership by one person from his use of them, will inhere upon the distribution of the property among the heirs of the person who imposed this condition, and the easement will pass to the one taking the dominant parcel as by an implied grant. This was held to be the case where two water privileges on opposite sides of a stream were owned by one person, and the spent water from the mills on one side was discharged below the dam which fed the mills on the other side; and the right to thus discharge the spent water continued, upon the owner's death, and the division of the estate, in the respective heirs in severalty.⁴

The owner of a mill and the owner of a tract of land adjoining, through which the mill race flowed, claimed title under a deed of partition which reserved to the owner of the mill the entire water right as then enjoyed by the mill, with free ingress and egress for the repairs of the dam and race, and a sufficiency of earth for such

¹ Johnson v. Jordan, 2 Met. 234, 242, 37 Am. Dec. 85. See also Randall v. McLaughlin, 10 Allen, 366; Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748; Stillwell v. Foster, 80 Me. 333, 14 Atl. Rep. 731.

² Russell v. Watts, 25 Ch. Div. 559, 573; Swansborough v. Coventry, 9 Bing. 305, per Tindal, C. J.; Mitchell v. Seipel, 53 Md. 251, 270, 36 Am. Rep. 404, per Miller, J.; Brakely v. Sharp, 10 N. J. Eq. 206, 209.

³ Ellis v. Bassett, 128 Ind. 118, 27 N. E. Rep. 344; Kilgour v. Ashcom, 5 H. & J. 82; Huttemeier v. Albro, 18 N. Y. 48; Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671; Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247.

⁴ Mason v. Horton, 67 Vt. 266, 31 Atl. Rep. 291.

repairs. Suit was brought by the owner of the mill to recover damages for injuries to the banks and to the race, alleged to have been caused by the cattle of the owner of the adjoining tract of land, while standing in and crossing the race. It was held that the parties to the suit were entitled to the same rights as enjoyed by those under whom they respectively claimed, at the time the deed of partition was executed, the plaintiff to the entire water right and the defendant to drive his cattle across the race, or to suffer them to stand in it.¹

141. There is, however, much authority for holding that upon the severance of an estate an apparent easement is reserved under very much the same circumstances that warrant an implied grant of such an easement;² though no easement can be taken as reserved by implication, unless it is *de facto* annexed to the grantor's estate at the time of the grant, is open, visible and continuous and necessary to the enjoyment of the estate which the grantor retains. "The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it

¹ Clark v. Debaugh, 67 Md. 430, 10 Atl. Rep. 241.

² Illinois: Cihak v. Klekr, 117 Ill. 643, 7 N. E. Rep. 111; Morrison v. King, 62 Ill. 30.

Indiana: Steinke v. Bentley, 6 Ind. App. 663, 34 N. E. Rep. 97.

New Hampshire: Dunklee v. Wilton R. Co., 24 N. H. 489.

New Jersey: Greer v. Van Meter (N. J. Eq.), 33 Atl. Rep. 794; Kelly v. Dunning, 43 N. J. Eq. 62, 10 Atl. Rep. 276; Fettes v. Humphreys, 18 N. J. Eq. 260; Seymour v. Lewis, 13 N. J. Eq. 439, 78 Am. Dec. 108; Denton v. Leddell, 23 N. J. Eq. 64. See, however, Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. Rep. 182.

North Carolina: Shaw v. Etheridge, 3 Jones, 300; Hair v. Downing, 96 N. C. 172.

Pennsylvania: Ormsby v. Pinkerton, 159 Pa. St. 458, 28 Atl. Rep. 300; Geible v. Smith, 146 Pa. St. 276, 23

Atl. Rep. 437; Seibert v. Levan, 8 Pa. St. 383, 49 Am. Dec. 525; Pierce v. Cleland, 133 Pa. St. 189, 19 Atl. Rep. 352; Pennsylvania R. Co. v. Jones, 50 Pa. St. 417, 423; Zell v. Universalist Soc., 119 Pa. St. 390, 13 Atl. Rep. 447; Cannon v. Boyd, 73 Pa. St. 179; Phillips v. Phillips, 48 Pa. St. 178, 86 Am. Dec. 577; Overdeer v. Updegraff, 69 Pa. St. 110.

South Carolina: Elliott v. Rhett, 5 Rich. L. 405, 57 Am. Dec. 750; Crossland v. Rogers, 32 S. C. 130, 10 S. E. Rep. 874.

Tennessee: Rightsell v. Hale, 90 Tenn. 556, 18 S. W. Rep. 245.

Vermont: Harwood v. Benton, 32 Vt. 724.

Wisconsin: Galloway v. Bonesteel, 65 Wis. 79, 26 N. W. Rep. 262, 56 Am. Rep. 616; Jarstadt v. Smith, 51 Wis. 96, 8 N. W. Rep. 29; Dillman v. Hoffman, 38 Wis. 559.

and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of the burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing to change materially the relative value of the respective parts.”¹

In Louisiana such an implied reservation is provided for by the Code, which declares that if the owner of two estates, between which there exists an apparent sign of servitude, sell one of those estates, and if the deed of sale be silent respecting the servitude, the same shall continue to exist actively or passively in favor of or upon the estate which has been sold.² Accordingly where the owner of two lots with buildings sells one of them, and between them there is an apparent sign of servitude, with reference to which the deed was silent, the servitude continues to exist. Thus, water-pipes and gutters fastened to the building sold, for the use of that retained, constitute a servitude upon the lot sold in favor of that retained, if they were attached by the owner of both and used during his ownership, and this apparent ownership continued at the time of the sale and afterwards.³

142. The leading case in support of the doctrine of implied reservations of easements is the much-discussed case of *Pyer v. Carter*.⁴ In that case the owner of a single house converted it into two houses. While he was the sole owner he had constructed a drain under both of them. He sold the houses, one after the other

¹ *Outerbridge v. Phelps*, 13 Abb. N. C. 117, 125, 58 How. Pr. 77, per Sel. 469. ³ *Taylor v. Boulware*, 35 La. Ann.

den, J. See, however, later cases, § 128. ⁴ 1 H. & N. 916, 922 (1857)

² R. Civ. Code, art. 769.

to different purchasers, and the first purchaser who bought the lot over which the other house was drained stopped the drain, so that the water from the other house could not flow off. It was not shown that such first purchaser knew of the position of the drain. In an action by the second purchaser judgment was given in his favor, the court saying that the defendant took his part of the house "such as it is," subject to all the apparent signs of servitude which existed; and that by "apparent signs must be understood not only those which must necessarily be seen but those which may, be seen or known on a careful inspection by a person ordinarily conversant with the subject."

This case has been repeatedly disapproved in England. In *Suffield v. Brown*,¹ Lord Chancellor Westbury, after stating the case of *Pyer v. Carter*, said: "It was held that the second purchaser was entitled to the ownership of the drain, that is, to a right over the freehold of the first purchaser, because, said the learned judges, the first purchaser takes the house, 'such as it is.' But with great respect, the expression is erroneous, and shows the mistaken view of the matter; for in a question, as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house not 'such as it is,' but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer v. Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the court that the easement was 'apparent,' because the purchaser might have found it out by inquiry; but the previous question is whether he is under any obligation to make inquiry, or would be affected by the result of it; which, having regard to his contract and conveyance, he certainly was not. Under the circumstances of the case of *Pyer v. Carter*, the true construction was, that as between the purchaser and the vendor, the former had the right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority."²

¹ 4 De G. J. & S. 185, 196 (1864).

² See, also taking the same view, *Crossley v. Lightowler*, L. R. 2 Ch. 478, per Lord Chelmsford; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Brown v. Alabaster*, 37 Ch. D. 490; *Russell*

v. Harford, L. R. 2 Eq. 507; *Carey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688, per Hoar, J.; *Randall v. McLaughlin*, 10 Allen, 366, 368; *Buss v. Dyer*, 125 Mass. 287; *Warren v. Blake*, 54 Me. 276, 89 Am.

III. *When Continuous and Apparent.*

143. A continuous easement is one which may be enjoyed without the intervention of any act on the part of anyone; as a drain, by which surface water is carried overland. A non-continuous easement is one to the enjoyment of which the act of the party is essential, and of this class is a right of way.¹ “Both these, the continuous and the non-continuous, may be granted and annexed to the same estate. Upon the unity of title they would both cease to exist as easements. Upon the severance of the estate the continuous would revert and pass by the conveyance, but the non-continuous would not revert or pass but by a new creation. This distinction, and this result, is recognized in the earlier and later cases upon the subject.”²

The test of continuousness is that there is an alteration or arrangement of a tenement which makes one part of it dependent in some measure upon another. This alteration or arrangement must be intended to be permanent in its nature. As applied to a water course it is not essential that the water should flow of itself continuously, but that the artificial arrangement by which the flow of water is produced should be of a permanent nature. This is the conclusion stated by Mr. Gale in his work upon Easements.³ “It is with a view of bringing out this quality of permanence that the learned author contrasts this class of easements with a right of way, ‘the enjoyment of which depends upon an actual interference of

Dec. 743; *Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404; *Burns v. Gallagher*, 62 Md. 462; *Shoemaker v. Shoemaker*, 11 Abb. N. C. 80, 84; article by Clement Hugh Hill, 4 Am. L. Rev. 40.

¹ *Polden v. Bastard*, L. R. 1 Q. B. 156, aff'g 4 B. & S. 258; *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. Rep. 509; *Bonelli v. Blakemore*, 66 Miss. 136, 5 So. Rep. 228; *Kelly v. Dunning*, 43 N. J. Eq. 62, 10 Atl. Rep. 276; *Denton v. Leddell*, 23 N. J. Eq. 64; *Fetters v. Humphreys*, 18 N. J. Eq. 260; *Lampman v. Milks*, 21 N. Y. 505; *Outerbridge v. Phelps*, 58 How. Pr. 77; *O'Rorke v. Smith*, 11 R. I. 259, 23 Am. Rep. 440; *Providence Tool Co. v.*

Corliss Steam Co., 9 R. I. 564; *Evans v. Dana*, 7 R. I. 306; *Kenyon v. Nichols*, 1 R. I. 411; *Elliott v. Rhett*, 5 Rich. L. 405, 57 Am. Dec. 750.

Louisiana: The Code declares: Continuous servitudes are those whose use is or may be continued, without the act of man. Such are aqueducts, drain, view and the like. Discontinuous servitudes are such as need the act of man to be exercised. Such are the rights of passage, of drawing water, pasture and the like. R. Civ. Code, 1889, Art. 727.

² *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564, 572, per *Brayton, J.*

³ *Gale on Easements*, 6th ed. p. 87.

man at each time of enjoyment.' Now, what is meant by that sentence is that the burthen of the easement in the case of a right of way is not felt by the servient tenement except at the moment of each enjoyment of it. A permanent structure upon, or alteration of, the servient tenement is not a necessary element of such an easement. And by the expression 'interference of man at each time of enjoyment,' is meant no more than an interference with the servient tenement by an entry upon it, as illustrated not only by ordinary rights of way, but also by rights of way with a right to take something from the servient tenement."¹

To make an easement of a flow of water continuous, it is not essential that it shall be so arranged that the flow of water is by force of gravity alone. The mere fact that a machine is used, such as a hydraulic ram, which is substantially self-acting, does not make the easement non-continuous. "It is said that the owner of the servient tenement will be subjected to the servitude of a more frequent entrance upon his land for the purpose of adjusting and repairing the ram than he would in case of an artificial ditch or pipe or dam. But I think the difference is one of degree and not of character, and it is hardly necessary to say that a mere difference of degree will not alter the case."² And so the use of a pump to produce a flow of water from a spring or well does not destroy the continuous character of the easement.³

144. A non-continuous easement is one whose enjoyment depends upon an actual interference of man at each time of enjoyment. "There is a distinction between easements," says Chief Justice Erle, "such as a right of way, or easement used from time to time, and easements of necessity or continuous easements. The law recognizes this distinction, and it is clear that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant, but with regard to easements which are used from time to time only, they do not pass unless the owner, by appropriate language, shows an intention that they should pass. The right to go to a well and take water is not a continuous easement, nor is it an easement of

¹ *Larsen v. Peterson*, 53 N. J. Eq. 88, 94, 30 Atl. Rep. 1094, per Pitney, V. C., citing *Polden v. Bastard*, 4 B. & S. 257, L. R. 1 Q. B. 156.

² *Tooth v. Bryce*, 50 N. J. Eq. 589, 610, 25 Atl. Rep. 182, per Pitney, V. C.

³ *Larsen v. Peterson*, 53 N. J. Eq. 88, 95; *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108.

necessity." In the case before the court the owner of the adjoining estates devised them to different persons. There was on one of them a well and pump to which the tenant of the other was, when the will was made, and for some time before had been, in the habit of resorting for water, with the knowledge of the testatrix, using a footway from his dwelling-house into the yard where the pump was. He had no supply of water on his own premises, but might have obtained it there by digging a well fifteen or twenty feet deep. The testatrix devised the premises "as now in the occupation" of the tenant. The devisee sold to the defendant, who claimed the right to use the pump.¹

145. Three things are essential to the creation of an easement upon the severance of an estate, upon the ground that the owner before the severance made or used an improvement in one part of the estate for the benefit of another. First, there must be a separation of the title. Second, it must appear that before the separation took place the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and, third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. "An easement which is apparent and continuous, such as a drain or other artificial water-course, a thing which is continuous in its service, and can always be seen or known on careful inspection, will pass on the severance of two tenements as appurtenant, without the use of the word 'appurtenances;' but an easement which is not apparent and non-continuous such as a right of way, which is enjoyed at intervals, leaving no visible sign, in the interim, of its existence, will not pass unless the grantor uses language sufficient to create the easement *de novo*." ²

146. If the arrangement or improvement is apparently designed to be permanent, and is valuable to the enjoyment of the parcel granted, it is presumed that the parties contracted with reference to the condition of the property at the time of the grant. "A mere temporary or provisional arrangement, however, which may have been adopted by the owner for the more convenient enjoyment of the estate, cannot constitute the degree of necessity or permanency which would authorize the engrafting upon a deed, by construction,

¹ Polden v. Bastard, 4 B. & S. 258, 70, 10 Atl. Rep. 276, per Van Fleet, V. aff'd, L. R. 1 Q. B. 156. C.; Hurlburt v. Firth, 10 Phil. 135;

² Kelly v. Dunning, 43 N. J. Eq. 62, Kieffer v. Imhoff, 26 Pa. St. 438.

of a right to the enjoyment of something not within the lines described. To justify such construction, it must appear from the disposition, arrangement and use of the several parts, that it was the owner's purpose in adopting the existing arrangement to create a permanent and common use in the one part for the benefit of the other, or for the mutual benefit of both, and it must be reasonably inferable, from the existing disposition and use, that it was intended to be continuous, notwithstanding the severance of ownership."¹

147. Where the easement or quasi-easement is continuous, apparent and reasonably necessary to the beneficial enjoyment of the estate for which it is claimed, a grant thereof will be implied.² The rule applies especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits and water-pipes or spouts, all these being continuous easements technically so called,—that is to say, easements which are enjoyed without any active intervention of the party entitled to enjoy them."³

¹ *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582, 2 N. E. Rep. 188, 53 Am. Rep. 550, per Mitchell, C. J., citing *Francies's App.*, 96 Pa. St. 200. And see *Flint v. Bacon*, 13 Hun, 454.

² *Maryland*: *Oliver v. Hook*, 47 Md. 301.

Michigan: *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. Rep. 509.

Mississippi: *Bonelli v. Blakemore*, 66 Miss. 136, 5 So. Rep. 228.

New Jersey: *Kelly v. Dunning*, 43 N. J. Eq. 62, 10 Atl. Rep. 276; *Fetters v. Humphreys*, 19 N. J. Eq. 471; *Stuyvesant v. Woodruff*, 21 N. J. L. 133, 47 Am. Dec. 156; *Denton v. Leddell*, 23 N. J. Eq. 64.

New York: *Lampman v. Milks*, 21 N. Y. 505, 508; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352.

Pennsylvania: *Geible v. Smith*, 146 Pa. St. 276, 23 Atl. Rep. 437; *Grace Meth. Epis. Church v. Dobbins*, 153 Pa. St. 294, 25 Atl. Rep. 1120; *Overdeer v. Updegraff*, 69 Pa. St. 110; *Francies's Appeal*, 96 Pa. St. 200; *Kieffer v. Imhoff*, 26 Pa. St. 438.

Rhode Island: *O'Rorke v. Smith*, 11 R. I. 259, 262, 23 Am. Rep. 440, per Durfee, C. J. To like effect, *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564, 571; *Evans v. Dana*, 7 R. I. 306.

Tennessee: *Brown v. Berry*, 6 Coldw. 98.

Virginia: *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

In *Louisiana* the Code provides: Servitudes are either visible and apparent or non-apparent. Apparent servitudes are such as are to be perceivable by exterior works; such as a door, a window, an aqueduct. Non-apparent servitudes are such as have no exterior sign of their existence; such, for instance, as the prohibition of building on an estate, or of building above a particular height. R. Civ. Code, 1889, Art. 728.

In *Pennsylvania*, contrary to the general rule, a right of way is regarded as a continuous and apparent easement which passes by implication. *Cannon v. Boyd*, 73 Pa. St. 179.

³ *O'Rorke v. Smith*, 11 R. I. 59, per Durfee, C. J.

If the owner of land subjects one part of it to accommodations resembling continuous easements for the benefit of another part, such accommodations, by conveyance of one part, readily become continuous easements for the benefit of the other part.¹ If the dominant part of the estate is first sold, the reasons are strong for holding that the part retained is subject to such easements.² This rule applies to cases of judicial sales of the part of the land subject to continuous and apparent servitudes, as well as to private sales.³

148. To create an implied easement upon the severance of an estate the easement or servitude must be open and visible, or there must be some apparent mark or sign which would indicate its existence to one reasonably familiar with the property, on an inspection of it.⁴

Where the easement is not contained in the grant, it does not exist unless the sign of the servitude be open and visible, or there be some apparent mark or sign which would indicate its existence on an inspection of the premises by one familiar with them. Thus, the owner of land upon which there was a building, conveyed the part upon which the building stood by metes and bounds without mentioning the building. Afterwards he conveyed the remaining part of the land to another, who had a survey of the land made, which showed that a portion of the building stood upon a portion of the land conveyed to him. It was held that the purchaser of the building had no easement upon the adjoining land in respect to the overlapping of his building, for no ordinary inspection of the premises would reveal the fact that the building extended beyond the line of the lot upon which it was supposed to stand.⁵

¹ *Kenyon v. Nichols*, 1 R. I. 411; *Evans v. Dana*, 7 R. I. 306; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *Wetmore v. Fiske*, 15 R. I. 354, 5 Atl. Rep. 375; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *McCarty v. Kitchenman*, 47 Pa. St. 239, 86 Am. Dec. 538.

² §§ 129, 142.

³ *Cannon v. Boyd*, 73 Pa. St. 179.

⁴ *Suffield v. Brown*, 4 De G. J. & S. 185; *United States v. Appleton*, 1 Sumn. 492; *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352; *Ingals*

v. Plamondon, 75 Ill. 118; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *Hardy v. McCullough*, 23 Gratt. 251; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

⁵ *Reiners v. Young*, 16 N. E. Rep. 368, 109 N. Y. 648. Not reported in full because a majority of the court did not concur in the opinion. *Reiners v. Young*, 38 Hun, 335, to the contrary, seems to be overruled.

149. But the mere fact that a drain or aqueduct is concealed from casual vision does not prevent its being "apparent" within the meaning of the rule above stated.¹ In many cases both ends of the aqueduct or drain are visible, or there are signs by which they may be discovered; but this is not essential. Water-pipes leading from a driven well in a yard to sinks in the kitchens of a double dwelling-house, there ending in pumps, by which the water is habitually drawn from the well for domestic purposes, the well and water-pipe being completely hidden from view, form an apparent and continuous easement which passes with a conveyance of one part of the dwelling-house, the owner retaining the other part of the house and the yard containing the well. Here the only thing visible was the pump, but that indicated water-pipes and a supply of water from some source. The controlling fact in this case is that the existence of a *quasi*-easement is shown by something in sight upon the dominant tenement. "That is the point to which the attention of the purchaser is naturally directed; and the principle upon which the cases go is that he is entitled to the tenement he buys in its then present condition, and the use of all such easements as are apparent and continuous. Now, the easement which he sees on the tenement which he buys must be held to be apparent."²

An easement is apparent if the parties have actual knowledge of its existence, or knowledge of such parts as to put them upon inquiry.³

150. A drain is a continuous easement, but whether it is apparent depends upon circumstances.⁴ If it is apparent, then "if the owner of a tract of land, of which one part has had the benefit of a drain through or in the other part, sells either part, an easement is created by implication of law in or to the other part. And this is the case even if it is the servient part that is sold."

¹ *Nicholas v. Chamberlain*, Cro. Jac. 121, an aqueduct; *Pyer v. Carter*, 1 H. & N. 916, a drain; *Watts v. Kelson*, L. R. 6 Ch. 166, an aqueduct; *Larsen v. Peterson*, 53 N. J. Eq. 88, 92, 30 Atl. Rep. 1094, an aqueduct; *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. Rep. 182, an aqueduct.

² *Larsen v. Peterson*, 53 N. J. Eq. 88, 93, per Pitney, V. C.

³ *Larsen v. Peterson*, 53 N. J. Eq. 88, 94, per Pitney, V. C. See as to knowledge, *Tabor v. Bradley*, 18 N. Y. 109.

⁴ *Denton v. Leddell*, 23 N. J. Eq. 64, per Zabriskie, Ch. See also *Kelly v. Dunning*, 43 N. J. Eq. 62, 10 Atl. Rep. 276; *McPherson v. Acker*, *McArthur & M.* 150.

In most of the cases under ordinary circumstances, a drain is regarded as both a continuous and apparent easement.¹

The owner of two adjoining houses and lots in a city built a vault half in each lot, and erected an out-house for each dwelling over the vault. A drain from the vault ran through one of the lots, which the owner sold by a deed with full covenants without reservation. There was nothing in the situation or appearance of the premises to indicate the existence of a drain. It was held that the servitude was not apparent and that no easement existed in favor of the other lot.²

Upon assignment of dower and homestead, an implied easement that is not necessary for the part assigned is not created in the assignee. Thus, there is no visible right to use a sewer running from the premises assigned in dower, which discharged upon another part of the land which was formerly of the same estate, if a cesspool could be built upon any part of the land assigned at a reasonable outlay. The former ownership of these different parcels by one person does not subject each parcel to all the uses made of it before the division for the benefit of the other.³

The purchaser of land through which there is an underground drain, not apparent, takes the land free from the servitude of the drain. "He has the right to suppose that the apparent condition is the real one, and if the deed gives no notice of any right in favor of the lot retained by the grantor upon or across the lot conveyed, the latter lot is freed from the servitude. The grantor cannot both sell his right and keep it."⁴

151. An aqueduct or conduit by pipes for conveying water is an apparent easement.⁵ Where one purchased land upon which there was at the time a stable and green-house which were supplied with two continuous streams of water, forced up through an underground pipe from the hydraulic rams driven by the waters of a spring

¹ *Pyer v. Carter*, 1 H. & N. 916, which is not questioned on this point; *Ewart v. Cochrane*, 4 Macq. 117; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Thayer v. Payne*, 2 Cush. 327; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

² *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352.

³ *Smith v. Smith*, 62 N. H. 429; *Smith v. Blanpied*, 62 N. H. 652.

⁴ *Munsion v. Reid*, 46 Hun, 399, 403, per Landon, J.; *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352; *Outerbridge v. Phelps*, 13 J. & S. 555; *Johnson v. Knapp*, 150 Mass. 267, 23 N. E. Rep. 40; *Dolliff v. Boston & M. R. Co.*, 68 Me. 173.

⁵ *Nicholas v. Chamberlain*, Cro. Jac. 121; *Wardle v. Brocklehurst*, 1 El. & El. 1058.

on a portion of the grantor's estate which he retained, it was held that the flow of water so driven up by the rams was an apparent and continuous easement which passed with the land conveyed as necessary for the beneficial use of the premises, and with it as a secondary easement, the right to enter upon the land retained to repair and maintain the rams, and that the defendant did not alter complainant's rights by stopping the flow at the barn just before the delivery of the deed.¹

152. An open ditch is an apparent and continuous easement of the kind that arises upon the severance of an estate. "If a man has two fields, drained by an artificial ditch cut through both, and he grants to another person one of the fields, neither he nor his grantee can stop up the drain, for there would be the same right of drainage after the grant as before, since the land was sold with the drain in it."² An open artificial water-course is governed by the same rule as a natural water-course.³

The enjoyment of light and air is an apparent and continuous easement and passes by an implied grant or reservation, in the few states in which such an easement can be created by implication. Thus the presence of a window, in use for the purpose of admitting light and air at the time of a conveyance, makes the easement apparent and the quality of the enjoyment of this easement is wholly continuous.⁴

153. A party-wall is both an apparent and continuous easement. Where the owner of one of two adjoining buildings conveyed one of them by a description which passed with the lot the party-wall and two inches beyond, the lot so conveyed was impliedly charged with a servitude of having the party-wall stand as an exterior wall for the other building, and as a support for its beams so long, at least, as the buildings should endure. Upon a severance of the two properties one was charged with the servitude and the other acquired a corresponding easement. This would be discovered by an inspection of the premises by one familiar with them, and a measurement of the house would certainly have disclosed it.⁵

¹ Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. Rep. 182.

² Dodd v. Burchell, 1 Hurl. & Colt. 113, per Baron Martin; Hair v. Downing, 96 N. C. 172; Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165; Scott v. Beutel, 23 Gratt. 1.

³ Munsion v. Reid, 46 Hun, 399.

⁴ Greer v. Van Meter (N. J. Eq.) 33 Atl. Rep. 794.

⁵ Rogers v. Sinsheimer, 50 N. Y. 646; the case of Griffiths v. Morrison, 106 N. Y. 165, 12 N. E. Rep. 580, is distinguished. See also Reiners v. Young,

IV. *The Element of Necessity.*

154. It is declared in many cases that no easement or quasi-easement can be taken as granted or reserved by implication, unless it is reasonably necessary to the enjoyment of the estate granted or retained by the grantor, and the easement is in fact annexed to it and in use at the time of the grant, and is, as well, open, apparent and continuous.¹

It has been shown already that the doctrine of implied easements upon the severance of a tenement is confined to cases of grants, according to the best authorities in England and America. The rule, therefore, that an implied easement must be reasonably necessary should be confined to cases of grants. According to these authorities there can be no reservation of an easement by implication unless the easement is strictly one of necessity.² Where how-

38 Hun, 335; *Eno v. Del Vecchio*, 4 Duer, 53, 6 Duer, 17; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Ingals v. Plamondon*, 75 Ill. 118; *Howell v. Estes*, 71 Tex. 690, 12 S. W. Rep. 62; *Western Nat. Bank's App.*, 102 Pa. St. 171.

¹ *Brown v. Alabaster*, L. R. 37 Ch. D. 490; *Watts v. Kelson*, L. R. 6 Ch. App. 166; *Russell v. Watts*, L. R. 25 Ch. D. 559, 573; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Suffield v. Brown*, 4 De G. J. & S. 185; *Polden v. Bastard*, L. R. 1 Q. B. 156, aff'g 4 B. & S. 258.

California: *Cave v. Crafts*, 53 Cal. 135.

Connecticut: *Whiting v. Gaylord*, 66 Conn. 337.

Illinois: *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. Rep. 111.

Indiana: *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582, 2 N. E. Rep. 188.

Kentucky: *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484.

Maryland: *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353; *Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404.

Massachusetts: *Thayer v. Payne*, 2 Cush. 327.

New Jersey: *Kelly v. Dunning*, 43 N.

J. Eq. 62, 10 Atl. Rep. 276; *Brakely v. Sharp*, 10 N. J. Eq. 206, 9 N. J. Eq. 9; *Fetters v. Humphreys*, 18 N. J. Eq. 260, 19 N. J. Eq. 471.

New York: *Griffiths v. Morrison*, 106 N. Y. 165, 12 N. E. Rep. 580; *Lampman v. Milks*, 21 N. Y. 505; *Burr v. Mills*, 21 Wend. 290.

Pennsylvania: *Francies's Appeal*, 96 Pa. St. 200.

Rhode Island: *O'Rorke v. Smith*, 11 R. I. 259, 264; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *Evans v. Dana*, 7 R. I. 306.

South Carolina: *Crosland v. Rogers*, 32 S. C. 130, 10 S. E. Rep. 874; *Ferguson v. Witsell*, 5 Rich. L. 280, 57 Am. Dec. 744; *Elliott v. Rhett*, 5 Rich. L. 405, 57 Am. Dec. 750.

Vermont: *Goodall v. Godfrey*, 53 Vt. 219.

Virginia: *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

Wisconsin: *Dillman v. Hoffman*, 38 Wis. 559, 575; *Galloway v. Bonesteel*, 65 Wis. 79, 83, 26 N. W. Rep. 262; *Jarstadt v. Smith*, 51 Wis. 96, 8 N. W. Rep. 29.

² *Carbrey v. Willis*, 7 Allen, 364, 370, 83 Am. Dec. 688; *Buss v. Dyer*, 125 Mass. 287, 291; *Oliver v. Pitman*, 98

ever, the doctrine of implied grants is made to apply equally to reservations as well as to grants, the rule in regard to the necessity of the easement is in general that it must be reasonably necessary.

This distinction will account for some of the apparent conflicts in the decisions as regards the necessity of the easement; and the observance of it will serve to bring some decisions into harmony with established principles of law.

Whether an easement is implied in a grant depends upon the law of equitable estoppel arising from the appearances created by the act of the grantor. If, by holding out certain appearances to the purchaser, he induces the expectation on his part that with the land purchased he is to receive certain privileges, it would be inequitable for the grantor to defeat that expectation by afterwards denying them.¹ "Some authorities," said Mr. Justice Cox, in the case cited, "allude vaguely to the necessity of the easement to the granted property as an element. But the rule into which the authorities seem to have drifted takes no account of this necessity, but relies entirely upon the appearances created by the act of the grantor."²

155. The element of necessity is not really involved in cases in which easements in the grantor's land are impliedly granted as a part of the property conveyed, as set forth in the first division of this chapter. This subject is fully considered in a recent very able decision in New Jersey in which Vice-Chancellor Pitney reviews the authorities and holds that in such cases the element of necessity does not enter at all; and that where the servient tenement is conveyed no easement is impliedly reserved by the grantor in any case except that of absolute necessity, as in case of a way of necessity. He says: "This distinction between a grant and a reservation by implication seems to be founded in logic, and, as will appear further on, is now thoroughly established in the English tribunals, and it seems to me to furnish the true test as to the value and importance of the element of necessity in the establishment of easements upon the division of tenements. My examination of the authorities has led me to the

Mass. 46; Nichols v. Luce, 24 Pick. 102, 35 Am. Dec. 302; Wells v. Garbutt, 132 N. Y. 430, 30 N. E. Rep. 978; Warren v. Blake, 54 Me. 276, 289, 89 Am. Dec. 748, per Kent. J.; Scott v. Beutel, 23 Gratt. 1, 7.

¹ McPherson v. Acker, MacArthur & M. 150, 48 Am. Rep. 749.

² This view is strongly enforced in the important case of Toth v. Bryce, 50 N. J. Eq. 589, 25 Atl. Rep. 182. See § 155.

conclusion that where the right to the easement is based upon the ground that it passes, as in substance, a valuable adjunct to the land conveyed, the element of necessity is not a requisite, and to use the word 'necessary' in connection with it is to misuse it. In saying this, I may say that I am, in appearance, at least, going contrary to what has been said and decided in many cases; but I think that an examination of them will show that in most, if not all, of those instances, where the case was that of an implied grant of an easement in connection with the conveyance of a *quasi*-dominant tenement, the so-called 'necessity' upon which the judges relied was, in fact, no necessity at all, but a mere beneficial and valuable convenience, and that this elevation of a mere convenience to the level of a necessity was the result of an attempt to obliterate the distinction between an implied grant and an implied reservation, before referred to, and to place implied reservations and implied grants upon the same footing, and to hold that upon the severance of a tenement, one part of which had been subjected to a *quasi*-servitude, which was continuous and apparent, in favor of the other, the easement would be preserved, whether it be by grant, when the dominant tenement is conveyed, or by reservation, when the servient tenement is conveyed; and as the latter could only occur where the element of necessity was present, it was held that such element must also be present in the former case."¹

156. To establish an easement by an implied reservation, where there has been a unity of possession, and a subsequent sale of a por-

¹ Toothe v. Bryce, 50 N. J. Eq. 589, 595, 603, 25 Atl. Rep. 182. In this case Vice-Chancellor Pitney traces the notion that an easement must be necessary for the use of the granted premises, in order to pass with them by implication, to a statement in the second edition of Mr. Gale's Treatise on Easements, which was not contained in the first edition. Mr. Gale says: "Upon the severance of an heritage a grant will be implied, first, of all those continuous and apparent easements which have in fact been used by the owner during the unity and which are necessary for the use of the tenement conveyed, though they have no legal existence as easements; and, secondly of all those easements without which the en-

joyment of the severed portions could not be had at all. "Pitney, V. C., says: "A careful examination of authorities leads me to the conclusion that this introduction into the second edition of this useful and much relied upon treatise of the quality of necessity as requisite in an apparent and continuous easement, in order that it should pass with a grant, was its first introduction into our system of jurisprudence. For while it was mentioned in Nicholas v. Chamberlain (1606), and Palmer v. Fletcher (1663), the cases which intervene between those cases and the publication of Mr. Gale's second edition do not show that it was considered a requisite."

tion of the land over which the easement is claimed, such easement must have been apparent, continuous and necessary at the time of such sale. The term "necessary" is to be understood as meaning that there could be no other reasonable mode of enjoying the dominant tenement without this easement. Thus, where one sold a portion of his own land, but failed to reserve the right to use a ditch which ran through it, and which was used to drain the portion unsold, a claim to an easement in the use of the ditch by implied reservation is not sufficiently supported, where there is no evidence that the necessity for the ditch is imperious and continuous, nor any facts stated which show that there is no other way in which the water at that point might find vent.¹ This is the strict rule and does not apply in several States in which little or no distinction is made between implied grants and implied reservations of easements.

157. The degree of necessity that must exist to give rise to an easement by implied grant, or to an easement by implied reservation, where such an easement is recognized, and no marked distinction is made between a grant and a reservation, is such merely as renders the easement necessary for the convenient and reasonable enjoyment of the property as it existed when the severance was made.² "The degree of necessity is to be determined rather by the

¹Crosland v. Rogers, 32 S. C. 130, 10 S. E. Rep. 874, per Simpson, C. J. See Ferguson v. Witsell, 5 Rich. L. 280, 284, 57 Am. Dec. 744, and Elliott v. Rhett, 5 Rich. L. 405, 413, 57 Am. Dec. 750, as to the element of necessity.

²Ewart v. Cochrane, 1 McQ. 117, 123, 7 Jur. N. S. 925; Pyer v. Carter, 1 H. & N. 916.

Illinois: Morrison v. King, 62 Ill. 30; Cihak v. Klekr, 117 Ill. 643, 7 N. E. Rep. 111.

Maryland: Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300.

New Jersey: Kelly v. Dunning, 43 N. J. Eq. 62, 10 Atl. Rep. 276; Fetters v. Humphreys, 18 N. J. Eq. 260.

New York: Simmons v. Cloonan, 81 N. Y. 557; Wells v. Garbutt, 132 N. Y.

430, 30 N. E. Rep. 978; Lampman v. Milks, 21 N. Y. 505.

Pennsylvania: Phillips v. Phillips, 48 Pa. St. 178, 86 Am. Dec. 577; Cannon v. Boyd, 73 Pa. St. 179.

South Carolina: Crosland v. Rogers, 32 S. C. 130, 10 S. E. Rep. 874.

Tennessee: Berry v. Brown, 6 Coldw. 98.

Texas: Howell v. Estes, 71 Tex. 690, 12 S. W. Rep. 62.

Vermont: Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671.

Virginia: Sanderlin v. Baxter, 76 Va. 299, 304, 44 Am. Rep. 165.

Wisconsin: Galloway v. Bonesteel, 65 Wis. 79, 56 Am. Rep. 616; Dillman v. Hoffman, 38 Wis. 559, 574, per Ryan, C. J.

permanency, apparent purpose, and adaptability of the disposition made by the owner during the unity of title, than by considering whether a possible use can be made of the parcel granted, after a discontinuance of the right formerly exercised over the other.”¹ The use of the right need not be absolutely necessary to the enjoyment of the thing granted. It is only requisite that the right shall materially affect the value of the thing granted.²

¹ *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582, 2 N. E. Rep. 188, 53 Am. Rep. 550, per Mitchell, C. J. ² *Spencer v. Kilmer* (N. Y.) 45 N. E. Rep. 865; *Paine v. Chandler*, 134 N. Y. 385, 32 N. E. 18.

CHAPTER IV.

CREATED BY PRESCRIPTION.

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| I. Period requisite to establish, 158-163. | IV. Interruption of use and resistance to it, 187-199. |
| II. What adverse user is requisite, 164-178. | V. Extent of right acquired, 200-203. |
| III. Use by license or permission, 179-186. | |

I. *Period Requisite to Establish.*

158. An easement by prescription is generally regarded in modern times as resting upon the fiction of a grant made and lost. The old common-law rule was that the use of the right must have begun at some period beyond the "time whereof the memory of man runs not to the contrary." In *Termes de la Ley* it is said: "Prescription is when a man claims anything because he, his ancestors or predecessors or they whose estate he hath, have had, or used it all the time whereof no memory is to the contrary."¹ At length in 1275, the commencement of the reign of Richard I, A. D. 1189, was fixed as the period of prescription for incorporeal rights. Although the statute of limitations of 21 Jas. I, ch. 16, A. D. 1623, undoubtedly suggested the propriety of giving to twenty years uninterrupted enjoyment of incorporeal rights an effect commensurate with that produced by a similar enjoyment of land, the judges seem to have been unwilling to apply the statute of limitations by analogy. They effected the same, however, by creating the fiction of a grant made and lost in modern times. "Such a fiction, like other fictions, may be open to the strictures passed upon it. Altogether, I must add, that it has had, in my opinion, in many respects a beneficial operation, and is, after all, but an extension of the fiction, which had previously formed the basis of prescriptive titles, for every prescription imports a grant which in most cases no one believes in. But whatever may be the merits or demerits of the fiction, it is too late

¹ *Termes de la Ley*, title, *Prescription*.

to question the validity of its introduction. The doctrine of lost grants forms part of the law of the land." ¹

In regard to lost grants, Pollock, B., in a recent case said: "Now, although a good deal has been said from time to time against the doctrine of lost grant, yet almost all civilized countries have adopted it. That doctrine amounts in substance to this: that if a legal right is proved to have existed and been exercised for a number of years the law ought to presume that it had a legal origin. Perhaps the doctrine has best been stated by Parke, B., ² who says, 'For a series of years prior to the passing of the prescription act, judges had been in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years by analogy to the statute of limitations. Such presumption did not always proceed on a belief that the thing presumed had actually taken place; but, as is properly said by Mr. Starkie, in his treatise on Evidence, a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation.' " ³

159. The English doctrine of a grant is generally followed in this country; ⁴ but the fiction of a grant has been repudiated in some cases, and the enjoyment of incorporeal rights for twenty years is regarded as conferring title solely by analogy to the period of limitations. Where the right is regarded as resting upon legislative limitation, and not upon a grant, ⁵ it may be taken away by legislative action. ⁶ The statute is regarded as making possession a bar or

¹ *Angus v. Dalton*, 4 Q. B. D. 162, 171, per Thesiger, L. J.

² *Bright v. Walker*, 1 Cr. M. & R. 211, 217. In *Rangely v. Midland R. Co.*, L. R. 3 Ch. App. 306, Lord Cairnes said: "Every easement has its origin in a grant express or implied." And see *Livett v. Wilson*, 3 Bing. 115; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605, 617.

³ *Bass v. Gregory*, 25 Q. B. D. 481 484.

⁴ *Hammond v. Zehner*, 21 N. Y. 118; *Lansing v. Wiswall*, 5 Den. 213; *Butt v. Napier*, 14 Bush. 39; *Hill v. Crosby*, 2 Pick. 466, 13 Am. Dec. 448; *White v. Chapin*, 12 Allen, 516; *Gayetty v. Bethune*, 14 Mass. 49, 53, 7 Am. Dec. 188;

Willey v. Norfolk So. R. Co., 96 N. C. 408; *Garrett v. Jackson*, 20 Pa. St. 331; *Ferrell v. Ferrell*, 1 Bax. 329; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; *French v. Marstin*, 24 N. H. 440. 57 Am. Dec. 294; *Lehigh Val. R. Co. v. McFarlan*, 43 N. J. L. 605; *Evans v. Dana*, 7 R. I. 306, 311, per Bullock, J.; *Brightman v. Chapin*, 15 R. I. 166, 1 Atl. Rep. 412.

⁵ *Krier's Private Road*, 73 Pa. St. 109; but see *Workman v. Curran*, 89 Pa. St. 226.

⁶ *Stuber's Road*, 28 Pa. St. 199. See *Att'y-General v. Revere Copper Co.*, 152 Mass. 444.

title of itself, in place of a presumption of law arising out of the fact of continued adverse possession.¹

The Supreme Court of California states the following reasons for presuming the grant of an easement: "The presumption of the grant of an easement, when indulged, is because the conduct of the other party, in submitting to the use for so long a time without objection, cannot be accounted for on any other hypothesis. The acts done by the party claiming the benefit of the presumption, and his predecessors in estate, must, however, have been in themselves such as the other party having the right to object to or complain of, did neither, but submitted to them without objection or challenge. * * * If they had no right to complain in the first instance, we are not driven to the presumption of the grant of an easement to account for why they did not complain."²

A lost grant is not to be presumed in support of an easement the origin of which is known.³

160. The period for acquiring an easement in land corresponds to the local statute of limitations as to land. It would be irrational to hold that an easement may not be acquired by the same lapse of time required to confer title to the land by adverse possession. The period of limitation for the bringing of actions to recover the possession of land is generally adopted as the period for perfecting easements by prescription, and there are many decisions to this effect, some of which are cited. In several states, however, there are special statutes relating to the acquisition of easements by prescription.⁴

¹ *Angus v. Dalton*, 3 Q. B. D. 85, 105, per Cockburn, C. J.; *Bright v. Walker*, 1 Cr. M. & R. 211, 218.

² *Hanson v. McCue*, 42 Cal. 303, 310, 10 Am. Rep. 299, per Wallace, J.

³ *Claffin v. Boston & A. R. Co.*, 157 Mass. 489, 32 N. E. Rep. 659.

⁴ *Ricard v. Williams*, 7 Wheat. 59, 110; *Hazard v. Robinson*, 3 Mason, 272.

Alabama: Ten years. Code 1886, § 2614; *Polly v. McCall*, 37 Ala. 20.

Arizona T.: Five years. R. S. 1887, § 2299.

Arkansas: Seven years. Dig. of Stats. 1894, § 4820; *Johnson v. Lewis*,

47 Ark. 66, 2 S. W. Rep. 329, 14 S. W. Rep. 466, per Clark, J.

California: Five years. Civ. Pro. § 321; *Crandall v. Woods*, 8 Cal. 136; *Barbour v. Pierce*, 42 Cal. 657; *Grigsby v. Clear Lake Co.*, 40 Cal. 396; *Thomas v. England*, 71 Cal. 456; *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. Rep. 879.

Colorado: Twenty years. Annot. Stats. Supp. 1896, § 2923, being Act of 1893, p. 327.

Connecticut: Fifteen years. G. S. 1888, § 1368; *Coe v. Wolcottville Manuf. Co.*, 35 Conn. 175.

Delaware: Twenty years. R. Code 1874, ch. 122, §§ 1, 2; *Clawson v. Prim-*

161. The statutes of limitations do not directly apply to actions in which incorporeal hereditaments, such as easements, are involved,

rose, 4 Del. Ch. 643; *Huggins v. Mc-Gregor*, 1 Harr. 447.

Florida: Seven years. R. S. 1892, § 1287.

Georgia: Twenty years. Code 1882, § 2682. But a private right of way over wild lands may be acquired by seven years' use and enjoyment of it when the owner has had six months knowledge without moving for damages; §§ 731, 2235; *Puryear v. Clements*, 53 Ga. 232. The route must be a fixed one not more than fifteen feet wide. *Short v. Walton*, 61 Ga. 28; *Aaron v. Gunnels*, 68 Ga. 528.

Idaho: Five years. R. S. 1887, § 4036.

Illinois: Twenty years. R. S. 1895, ch. 83, § 1; *Vail v. Mix*, 74 Ill. 127; *Ballard v. Struckman*, 123 Ill. 636, 14 N. E. Rep. 682; *Chicago v. Chicago, R. I. & P. R. Co.*, 152 Ill. 561, 38 N. E. Rep. 768; *McKenzie v. Elliott*, 134 Ill. 156, 24 N. E. Rep. 965; *Ribordy v. Pellachaud*, 28 Ill. App. 303; *Keyser v. Mann*, 36 Ill. App. 596; *Kuhlman v. Hecht*, 77 Ill. 570.

Indiana: Fifteen years. 1 R. S. 1894, § 295; *Miller v. Richards*, 139 Ind. 263, 38 N. E. Rep. 854; *Postlethwaite v. Payne*, 8 Ind. 104. A right of way, air, light or other easement from, in, upon or over the land of another, shall not be acquired by adverse use, unless such use shall have been continued uninterruptedly for twenty years. A notice in writing by the owner of the land to the claimant of such right, duly served or posted and recorded that the owner will dispute such right, is deemed an interruption of such use. §§ 5746-5749; *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. Rep. 109; *Cargar v. Fee*, 140 Ind. 572, 39 N. E. Rep. 93; *Nowlin v. Whipple*, 120 Ind. 596, 22 N. E. Rep. 669; *Fankboner v. Corder*, 127 Ind. 164, 266 N. E. Rep. 766; *Sheeks v. Erwin*, 130 Ind. 31, 29 N. E.

Rep. 11; *Harding v. Cowgar*, 127 Ind. 245, 26 N. E. Rep. 799, *Davis v. Cleveland, C. C. & St. L. R. Co. (Ind.)* 39 N. E. Rep. 495.

Iowa: Ten years. R. S. 1888, § 3734. Where title to an easement is claimed by adverse possession for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession must be proved by evidence independent of the use, and that the party against whom the claim is made had express notice thereof. This applies to public as well as private claims. No easement of light and air is acquired by erecting a building near the land of another with windows overlooking such land. No right of footway, except claimed in connection with a right to pass with carriages shall be acquired by adverse use for any length of time. A notice in writing by the owner of land to the person claiming any easement therein, of his intention to dispute any right arising from such claim duly served and recorded, shall be considered so far a disturbance of such right or claim as to enable the owner to bring an action to try such right. §§ 3206-3210; *State v. Birmingham*, 74 Iowa, 407, 38 N. W. Rep. 121. See, as to adverse user, *Churchell v. Burling-ton Water Co. (Iowa)* 62 N. W. Rep. 646.

An easement acquired by prescription before the statute was enacted may be enforced in accordance with the law as it existed when the rights were acquired. *McAllister v. Pickup*, 84 Iowa, 65, 50 N. W. Rep. 556.

Kansas: Fifteen years. G. S. 1889, § 4093.

Kentucky: Fifteen years. G. S. 1894, § 2505; *Hansford v. Berry*, 95 Ky. 56, 23 S. W. Rep. 665; *Gatewood v. Cooper*

but only to actions for the recovery of land. "But by judicial construction an adverse user of an easement for the period men-

(Ky.) 38 S. W. Rep. 690; *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. Rep. 88; *O'Daniel v. O'Daniel*, 88 Ky. 185, 10 S. W. Rep. 638; *Young v. Conrad* (Ky.) 38 S. W. Rep. 497; *Prewitt v. Graves* (Ky.) 35 S. W. Rep. 263; *Bowman v. Wickliffe*, 15 B. Mon. 84.

Maine: Twenty years. R. S. 1883, ch. 105, §§ 1, 13, 14. No right of way or other easement is acquired by adverse use unless this is continued uninterrupted for twenty years. The owner to prevent such right may give notice in writing to the person claiming it, of his intention to contest such right; and such notice duly served and recorded is deemed an interruption of such use. See *Cole v. Bradbury*, 86 Me. 380, 29 Atl. Rep. 1097.

Maryland: Twenty years. 21 Jac. 1, ch. 16; *Cox v. Forrest*, 60 Md. 74; *Barry v. Edlavitch* (Md.) 35 Atl. Rep. 170.

Massachusetts: Twenty years. Pub. Stats. 1882, ch. 196, § 1. Easements of light and air cannot be acquired by use. No person can acquire by adverse use a right of way or other easement unless such use is continued uninterrupted for twenty years. The acquirement of an easement may be prevented by notice by the landowner, posted in some conspicuous place upon the premises for six successive days; or the landowner may prevent a particular person or persons from acquiring such easement by causing a copy of such notice to be served upon him or them, and recorded within three months in the registry of deeds in the county or district where the land lies. Such notice is deemed to be a disturbance of the easement. Pub. Stats. 1882, ch. 122; *Hodgkins v. Farrington*, 150 Mass. 19, 22 N. E. Rep. 73, 5 L. R. A. 209; *Jennison v. Walker*, 11 Gray, 423; *Arnold v. Stevens*, 24 Pick. 106, 35

Am. Dec. 305; *Hoffman v. Savage*, 15 Mass. 130; *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45; *Coolidge v. Learned*, 8 Pick. 504; *Blake v. Everett*, 1 Allen, 248; *Sibley v. Ellis*, 11 Gray, 417. No enjoyment by a person or corporation for any length of time of the privilege of having or maintaining telegraph posts, wires, or apparatus in, upon, over, or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easement or raise any presumption of a grant thereof. P. S. 1882, ch. 109, § 15.

Michigan: Fifteen years. 2 Annot. Stats. 1882, § 8698; *Chapel v. Smith*, 80 Mich. 100, 45 N. W. Rep. 69; *Turner v. Hart*, 71 Mich. 128, 38 N. W. Rep. 890; *Hoag v. Place*, 93 Mich. 450, 53 N. W. Rep. 617.

Minnesota: Fifteen years. G. S. 1894, § 5134; *Mueller v. Fruen*, 36 Minn. 273, 30 N. W. Rep. 886.

Mississippi: Ten years. Annot. Code 1892, § 2730; *Hardy v. Ala. & V. R. Co.*, 73 Miss. 719, 19 So. Rep. 661; *Alcorn v. Sadler*, 71 Miss. 634, 14 So. Rep. 444, 42 Am. St. Rep. 484; *Bonelli v. Blakemore*, 66 Miss. 136, 5 So. Rep. 228; *Ryan v. Miss. Val. & S. I. R. Co.*, 62 Miss. 162; *Lanier v. Booth*, 50 Miss. 410.

Missouri: Ten years. R. S. 1889, ch. 103, § 6773; *Prac. Code* 1896, § 1657; *Smith v. Musgrove*, 32 Mo. App. 241; *House v. Montgomery*, 19 Mo. App. 170.

Montana: Ten years. Code of Civ. Pro. 195, § 483.

Nebraska: Ten years. Comp. Stats. 1895, § 5596; *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847, 57 N. W. Rep. 739, relating to right of way.

Nevada: Five years. G. S. 1885, § 3664; *Chollar-Potosi M. Co. v. Kennedy*, 3 Nev. 361, 93 Am. Dec. 409.

tioned in the statutes, as they were passed from time to time, became evidence of a prescriptive right; and finally, the fiction was invented of a lost grant, presumed from such user to have once been in exist-

New Hampshire: Twenty years. P. S. 1891, ch. 217, § 1; *Smith v. Putnam*, 62 N. H. 369; *Wallace v. Fletcher*, 30 N. H. 434; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; *French v. Marstin*, 24 N. H. 440, 57 Am. Dec. 294.

New Jersey: Twenty years. 2 G. S. 1895, p. 1977, § 24; *Stuyvesant v. Woodruff*, 21 N. J. L. 133, 47 Am. Dec. 156; *Horner v. Stillwell*, 35 N. J. L. 307; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Castner v. Riegel*, 54 N. J. L. 498, 24 Atl. Rep. 484; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605.

New Mexico: Ten years. Comp. Laws 1884, § 1881.

New York: Twenty years. Code Civ. Pro. 1895, §§ 365, 367; *Prentice v. Geiger*, 74 N. Y. 341, 347; *Haight v. Price*, 21 N. Y. 241, 246; *Miller v. Garlock*, 8 Barb. 153; *Rochester Electric Light Co. v. Rochester Power Co.*, 15 N. Y. Supp. 33, 38 N. Y. St. 950; *Stephens v. Hockemeyer*, 46 N. Y. St. 329, 19 N. Y. Supp. 666; *Woodruff v. Pad-dock*, 130 N. Y. 618, 29 N. E. Rep. 1021; *Snell v. Levitt*, 110 N. Y. 595, 18 N. E. Rep. 370; *Eckerson v. Crippen*, 110 N. Y. 585, 18 N. E. Rep. 443; *Bushey v. Santiff*, 86 Hun. 384, 33 N. Y. Supp. 473, 67 N. Y. St. 187; *Nicholls v. Wentworth*, 100 N. Y. 455, 3 N. E. Rep. 482; *Ward v. Warren*, 82 N. Y. 265; *Parker v. Foote*, 19 Wend. 309; *Corning v. Gould*, 16 Wend. 531; *Lansing v. Wiswall*, 5 Denio, 213; *Townsend v. Bissell*, 4 Hun. 297, 6 Thomp. & C. 565.

North Carolina: Twenty years. Code 1893, §§ 143, 144; *Benbow v. Robbins*, 71 N. C. 338.

North Dakota: Twenty years. R. Code 1895, § 5188.

Ohio: Twenty-one years. R. S. 1880. § 4977; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732.

Oklahoma: Fifteen years. Comp. Stats. 1893, § 3888.

Oregon: Ten years. 1 Annot. Laws 1892, ch. 1, § 4; *Coventon v. Seufert*, 23 Oreg. 548, 32 Pac. Rep. 508; *Tolman v. Casey*, 15 Oreg. 83, 13 Pac. Rep. 669.

Pennsylvania: Twenty-one years. 1 Bright. Purd. Dig. p. 1209, § 3; *Cooper v. Smith*, 9 Serg. & R. 26, 11 Am. Dec. 658; *Garrett v. Jackson*, 20 Pa. St. 331; *Biddle v. Ash*, 2 Ashm. 211.

Rhode Island: Twenty years. G. L. 1896, ch. 205, §§ 2-9. No easement of light or air can be acquired by mere lapse of time. No right of footway except claimed with a right to pass with carriages can be acquired by adverse use for any length of time. The legal owner of lands may give notice of writing to the person claiming or using any way, easement or privilege in his land of his intention to dispute any right arising from such use; and such notice served and recorded as provided shall be deemed an interruption of such use, and enables the party claiming such right to bring an action for disturbing the same in order to try such right. The privilege of maintaining telegraph, telephone, electric or other posts, wires or apparatus, in, upon, or over any buildings or lands is not acquired by enjoyment for any length of time.

South Carolina: Twenty years. Code Civ. Pro. 1893, § 95.

Tennessee: Seven years. Code 1896, §§ 4456-4458. "The period within which by prescription, an easement may be acquired or a servitude imposed has been settled as twenty years." *Railway Co. v. Mossman*, 90 Tenn. 157, 16 S. W. Rep. 64; *Ferrell v. Ferrell*, 1 Bax. 329.

Texas: Ten years. R. S. 1879, § 3194; 2 Sayles Civ. Stat. § 3194;

ence and to have become lost. The fiction of a lost grant seems to have been devised after the statute of James. It was called a lost grant, not to indicate that the fact of the existence of the grant originally was of importance, but to avoid the rule of the pleading requiring profert."¹ The owner of the servient tenement cannot overcome the presumption arising from the uninterrupted use of the easement for the period fixed by the statute of limitations, by proof that there was, in fact, no grant. The circumstance that no grant of the easement had, in fact, been made is immaterial, though the presumption of a grant may be rebutted by contradicting or explaining the facts upon which it rests.²

When these facts are shown it is the duty of the jury to presume a grant, and the duty of the court to so instruct the jury. "Not, however, because either the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long-continued possession shall not be disturbed."³

Texas West. R. Co. v. Wilson, 83 Tex. 153, 18 S. W. Rep. 325.

Utah: Twenty years. The Statute Comp. Laws 1888, §§ 3130-3140 which provides for a term of seven years for perfecting a title by adverse possession, does not apply in the case of easements, title to which cannot be acquired in less time than twenty years; for the statute provides that the property claimed adversely shall have been protected by a substantial enclosure, or must have been cultivated. Harkness v. Woodmansee, 7 Utah, 227, 26 Pac. Rep. 291.

Vermont: Fifteen years. R. S. 1894, §§ 1193, 1194; Tracy v. Atherton, 36 Vt. 503, 514. A public easement in a stream is not lost or abridged by prescription or adverse possession. § 3507. No enjoyment for any length of time of the privilege of maintaining a line of telegraph, telephone, or electric light poles, wires or other apparatus, upon or over the buildings or lands of other persons shall give a right to the continued enjoyment of such easement or raise a presumption of a grant thereof. § 4240.

Virginia: Fifteen years. Code 1887, § 2915.

Washington: Ten years. Code 1896, § 4061.

West Virginia: Ten years. Code 1891, ch. 104, § 1; Lucas v. Smithfield, etc. Turnpike Co., 36 W. Va. 427, 15 S. E. Rep. 182; Rogerson v. Shepherd, 33 W. Va. 307, 10 S. E. Rep. 632; Boyd v. Woolwine, 40 W. Va. 282, 21 S. E. Rep. 1020.

Wisconsin: Twenty years. Annot. Stats. 1889, § 4209; Scheuber v. Held, 47 Wis. 340, 2 N. W. Rep. 779; Pentland v. Keep, 41 Wis. 490; Haag v. Delorme, 30 Wis. 591, 594; Carmody v. Mulrooney, 87 Wis. 552, 58 N. W. Rep. 1109, relating to right of way.

Wyoming: Ten years. R. S. 1887, § 2366.

¹ Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605, 617.

² Angus v. Dalton, 3 Q. B. D. 85, 4 Q. B. D. 162; Dalton v. Angus, 6 App. Cas. 740.

³ Coolidge v. Learned, 8 Pick. 504; and see Tracy v. Atherton, 36 Vt. 503; White v. Chapin, 12 Allen, 516.

Prescription applies only to incorporeal hereditaments. An interest in the land of another greater than an incorporeal hereditament, such as the possession and use of a building thereon, cannot be established by prescription.¹ An exclusive right of possession cannot be established by prescription, but only a qualified right for a particular purpose.

162. But whether the presumption of title arising from the use of an easement for the requisite period, is one of law or one of fact, is a question upon which there has been some diversity of opinion. The weight of authority is that such presumption is conclusive as a matter of law, that the use of the easement was adverse and under a claim of right, in the absence of circumstances indicating the contrary; and moreover such enjoyment of the right affords a conclusive presumption of a grant of the right.² "When the fiction of a lost grant was devised, there arose considerable diversity and fluctuation in judicial opinions as to whether an uninterrupted user for the period of limitation conferred a legal right, or raised merely a presumption of title which would stand good until the presumption was overcome by evidence which negated, in the judgment of juries, the existence of a grant. This state of the law produced great insecurity to titles by prescription, and subjected such rights to the whim and caprice of juries. This evil was remedied by the later English authorities which gave to the presumption of title arising from an uninterrupted enjoyment of twenty years the most unshaken stability, and made it conclusive evidence of a right. * * * In this country the prevailing doctrine is, that an exclusive and uninterrupted enjoyment for twenty years creates a presumption, *juris et de jure*, and is conclusive evidence of title whenever, by possibility, a right may be acquired by grant."³

¹ 4 Blacks. Com. 264; Cortelyou v. St. 126; Strickler v. Todd, 10 S. & R. Van Brundt, 2 Johns. 357; Ferris v. 63, 13 Am. Dec. 649; Worrall v. Brown, 3 Barb. 105; Schuylkill Nav. Rhoads, 2 Whart. 427, 30 Am. Dec. Co. v. Stoeve, 2 Grant. Cas. 462; 274; Webber v. Chapman, 42 N. H. Caldwell v. Copeland, 37 Pa. St. 427, 326, 80 Am. Dec. 111; Winnipiseogee Co. v. Young, 40 N. H. 420; Olney v. 431.

² Angus v. Dalton, 4 Q. B. D. 162, 3 Fenner, 2 R. I. 211, 57 Am. Dec. 711; Q. B. D. 85; Dalton v. Angus, 6 App. Lehigh Valley R. Co. v. McFarlan, 43 C. S. 740; Campbell v. Wilson, 3 East, N. J. L. 605, 619; Coolidge v. Learned, 294; Tracy v. Atherton, 36 Vt. 503, 8 Pick. 504.

³ Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605, 618, per Depue, J. 513; Plimpton v. Converse, 42 Vt. 712; Pierce v. Cloud, 42 Pa. St. 102, 82 Am. Dec. 496; Esling v. Williams, 10 Pa.

163. There are cases in which the presumption of a grant arising from a user of the right for the statutory period is spoken of as *prima facie* rather than as conclusive; and there are others in which it is said there is a presumption of a grant, without describing it as either *prima facie* or conclusive.¹

But in all cases the adverse use and uninterrupted enjoyment of the right for the statutory period are facts essential to establishing title to the easement, and these facts are necessarily open to denial, contradiction and disproof by the party against whom they are asserted.² The Supreme Court of Vermont say: "We think, therefore, that in substance the presumption arising from such long continued possession, unrebutted, is a presumption of law, and that it is conclusive evidence, or sufficient evidence to warrant the court in holding that it confers a right on the possessor to the extent of his use. But it does not, in our opinion, go very far in determining the question in this case, whether the presumption from the length of possession is one of law, or one of fact, for, whichever it may be, it is liable to be rebutted in various ways. It may be shown to have originated or continued by leave of the owner; that it has not been under a claim of right, or not continuous, or that it has been interrupted by the owner of the land, and, whenever any evidence is introduced tending to invalidate the right claimed on any of these grounds that the case becomes a proper one to submit to the jury."³

No prescription runs against the State in any case.⁴

II. *What Adverse User is Requisite.*

164. An easement by prescription is created only by an adverse use of the privilege with the knowledge of the person against whom it is claimed, or by a use so open, notorious, visible and uninterrupted that knowledge will be presumed, and exercised under a claim of right adverse to the owner and acquiesced in by him; and such adverse user must have existed for a period equal at least to that

¹ Union Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145; Postlethwaite v. Payne, 8 Ind. 104; White v. Chapin, 12 Allen, 516; Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45; Lanier v. Booth, 50 Miss. 410; Watkins v. Peck, 13 N. H. 360, 47 Am. Dec. 156; Hammond v. Zehner, 21 N. Y. 118; Wilson v. Wilson, 4 Dev. 154; Steffy v. Car-

penter, 37 Pa. St. 41; Jones v. Jones, 2 Kerr (N. B.) 265.

² Livett v. Wilson, 3 Bing. 115, per Best, C. J.; Gray v. Bond, 2 Brod. & B. 667; Smith v. Miller, 11 Gray, 145, 148.

³ Tracy v. Atherton, 36 Vt. 503, 513.

⁴ Glaze v. Western & Atlantic R. Co., 67 Ga. 761.

prescribed by the statute of limitations for acquiring title to land by adverse possession.¹ "There need not be a claim of right in words,

¹ § 160.

Alabama: Roundtree v. Brantley, 34 Ala. 544, 73 Am. Dec. 470; Polly v. McCall, 37 Ala. 20.

Arkansas: Johnson v. Lewis, 47 Ark. 66, 2 S. W. Rep. 329.

California: Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. Rep. 623; Richard v. Hupp (Cal.) 37 Pac. Rep. 920; Alta Land Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645; Campbell v. West, 44 Cal. 646; American Co. v. Bradford, 27 Cal. 360; Thomas v. England, 71 Cal. 456, 12 Pac. Rep. 491.

Connecticut: School District v. Lynch, 33 Conn. 330; Ingraham v. Hutchinson, 2 Conn. 584.

Delaware: Huggins v. McGregor, 1 Harr. 447.

Georgia: Aaron v. Gunnels, 68 Ga. 528.

Illinois: Simpson v. Wright, 21 Ill. App. 67; Chicago & N. W. R. Co. v. Hoag, 90 Ill. 339; Warren v. Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Dexter v. Tree, 117 Ill. 532, 6 N. E. Rep. 506.

Indiana: Conner v. Woodfill, 126 Ind. 85, 25 N. E. Rep. 876; Parish v. Kaspare, 109 Ind. 586, 10 N. E. Rep. 109; Palmer v. Wright, 58 Ind. 486; Mitchell v. Parks, 26 Ind. 354.

Iowa: Close v. Samm, 27 Iowa, 510; McAllister v. Pickup, 84 Iowa, 65, 50 N. W. Rep. 356.

Kentucky: Manier v. Myers, 4 B. Mon. 514; Henry v. Koch, 80 Ky. 391.

Maine: Morse v. Williams, 62 Me. 445; Davis v. Brigham, 29 Me. 391; Trask v. Ford, 39 Me. 437.

Maryland: James v. Jenkins, 34 Md. 1, 6 Am. Rep. 300; Cox v. Forrest, 60 Md. 74.

Massachusetts: Stearns v. Janes, 12 Allen, 582; Blake v. Everett, 1 Allen, 248; Powell v. Bagg, 8 Gray, 441, 69

Am. Dec. 262; Sargent v. Ballard, 9 Pick. 251; Gloucester v. Beach, 2 Pick. 607; Gayetty v. Bethune, 14 Mass. 49, 55, 7 Am. Dec. 188; Medford First Parish v. Pratt, 4 Pick. 221; Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45; Hannefin v. Blake, 102 Mass. 297; Smith v. Miller, 11 Gray, 145.

Michigan: Hoag v. Place, 93 Mich. 450, 53 N. W. Rep. 617; Turner v. Hart, 71 Mich. 128, 38 N. W. Rep. 890, 15 Am. St. Rep. 243.

Mississippi: Lanier v. Booth, 50 Miss. 410.

Missouri: House v. Montgomery, 19 Mo. App. 170.

Nevada: Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 361, 93 Am. Dec. 409; Boynton v. Longley, 19 Nev. 69, 6 Pac. Rep. 437.

New Hampshire: Wallace v. Fletcher, 30 N. H. 434; Dunklee v. Wilton R. Co., 24 N. H. 489; Watkins v. Peck, 13 N. H. 360, 40 Am. Dec. 156; Webber v. Chapman, 42 N. H. 326, 80 Am. Dec. 111; French v. Marstin, 24 N. H. 440, 37 Am. Rep. 294; Eastman v. Amoskeag Manuf. Co., 47 N. H. 71.

New Jersey: Lehigh Valley R. Co. v. McFarlan, 30 N. J. Eq. 180; Fettes v. Humphreys, 18 N. J. Eq. 260, 19 N. J. Eq. 471; Denton v. Leddell, 23 N. J. Eq. 64.

New York: Root v. Wadhams, 107 N. Y. 384, 14 N. E. Rep. 281; Griffiths v. Morrison, 106 N. Y. 165, 12 N. E. Rep. 580; Bushey v. Santiff, 86 Hun, 384, 33 N. Y. Supp. 473; Treadwell v. Inslee, 120 N. Y. 458, 24 N. E. Rep. 651; Nicholls v. Wentworth, 100 N. Y. 455, 3 N. E. Rep. 482; Hammond v. Zehner, 21 N. Y. 118; Flora v. Carbean, 38 N. Y. 111; Ward v. Warren, 15 Hun, 600, 82 N. Y. 265; Colvin v. Burnet, 17 Wend. 564; Parker v. Foote, 19 Wend. 309; Hart v. Vose, 19 Wend. 365; Luce v. Carley, 24 Wend.

or a declaration that the use is adverse, or an admission on the part of the landowner that he has knowledge of the adverse use and claim of right. The nature of the use and the knowledge of the landowner may be inferred from the manner, character and frequency of the exercise of the right and the situation of the parties; and where an actual uninterrupted use and enjoyment, as of right, with knowledge of the other party, is shown to have existed a sufficient length of time to create the presumption of a grant, the presumption stands as sufficient proof and establishes the grant, unless it is rebutted by proof that the use and enjoyment were permissive."¹ The claim of right may be inferred from any circumstances that warrant such an inference.²

165. The acts of user must be of such a nature and of such frequency as to give reasonable notice to the landowner that the easement is claimed against him. If the right has been claimed and used only once or twice during twenty years, such use would not be likely to give notice to the landowner that the right was being claimed against him, and the law would not impute to him acquiescence in a claim of the existence of which there was no reasonable ground for imputing notice to him.³

451, 35 Am. Dec. 637; Maysville v. Wilcox, 61 Hun, 223,

North Carolina: Ingraham v. Hough, 1 Jones, 39, 42.

Oregon: Curtis v. LaGrande Water Co., 20 Oreg. 34, 23 Pac. Rep. 808; Huston v. Bybee, 17 Oreg. 140, 20 Pac. Rep. 51.

Pennsylvania: Cooper v. Smith, 9 S. & R. 26, 11 Am. Dec. 658; Esling v. Williams, 10 Pa. St. 126.

Rhode Island: Evans v. Dana, 7 R. I. 306; Providence Tool Co. v. Corliss Steam Engine Co., 9 R. I. 564.

South Carolina: Crosland v. Rogers, 32 S. C. 130, 10 S. E. Rep. 874.

Tennessee: Ferrell v. Ferrell, 1 Bax. 329.

Texas: Rhodes v. Whitehead, 27 Tex. 304 84 Am. Dec. 631.

Utah: Harkness v. Woodmansee, 7 Utah, 227, 26 Pac. Rep. 291.

Vermont: Perrin v. Garfield, 37 Vt. 304.

Virginia: Field v. Brown, 24 Gratt.

74; Stokes v. Upper Appomattox Co., 3 Leigh, 318.

West Virginia: Rogerson v. Shepherd, 33 W. Va. 307, 10 S. E. Rep. 632.

Wisconsin: Carmody v. Mulrooney, 87 Wis. 552, 58 N. W. Rep. 1109.

¹ Smith v. Putnam, 62 N. H. 369, 372, per Clark, J. And see Perrin v. Garfield, 37 Vt. 304; Blake v. Everett, 1 Allen, 248; Hannefin v. Blake, 102 Mass. 297; McCreary v. Boston & M. R. Co., 153 Mass. 300, 26 N. E. Rep. 864, 11 L. R. A. 359; Bushey v. Santiff, 84 Hun, 384, 33 N. Y. Supp. 473; Treadwell v. Inslee, 120 N. Y. 458, 24 N. E. Rep. 651; Nicholls v. Wentworth, 100 N. Y. 455, 3 N. E. Rep. 482.

² McCreary v. Boston & M. R. Co., 153 Mass. 300, 26 N. E. Rep. 864, 11 L. R. A. 359; Barnes v. Haynes, 13 Gray, 188, 74 Am. Dec. 629; Blake v. Everett, 1 Allen, 248.

³ Gilford v. Winnepiseogee Lake Co., 52 N. H. 262, per Smith, J., substan-

There can be no prescriptive right where there is a concealment of the use. "And in cases where the enjoyment was in the beginning wrongful, and the owner of the adjoining land may be said to have lost the full benefit of rights through his laches, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but for his laches, must have known what the enjoyment was and how far it went."¹

That the adverse use of an easement was not with the acquiescence or knowledge of the owner of the servient tenement may be shown by the testimony of such owner. Thus to prevent the establishment of a right to maintain a drain across a lot of land from another lot by adverse use continued for twenty years, the testimony of a person who within that time owned the first-named lot is admissible, that during the time he owned it he never knew of the existence of the drain.²

A right of action must have arisen for the adverse user to constitute a right by prescription; there must have been such an invasion of the rights of the party against whom the right is claimed that he would have a cause of action against the intruder.³

166. No easement by prescription can commence or exist while the dominant and servient estates are held by one and the same person.⁴ A claim to an easement by prescription cannot be

tially in his language; *Deerfield v. Connecticut Riv. R. Co.*, 144 Mass. 325, 11 N. E. Rep. 105; *Treadwell v. Inslee*, 120 N. Y. 458, 24 N. E. Rep. 651; *Speir v. New Utrecht*, 49 Hun, 294, 17 N. Y. St. 727; *Ward v. Warren*, 15 Hun, 600; *Cleveland v. Ware*, 98 Mass. 409; *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *Esling v. Williams*, 10 Pa. St. 126.

¹ *Dalton v. Angus*, 6 App. Cas. 740, 827, per Lord Blackburn.

² *Hannefin v. Blake*, 102 Mass. 297.

³ *Webb v. Bird*, 10 C. B. N. S. 285, 13 C. B. N. S. 841, per Willes, J.; *Dalton v. Angus*, 6 App. Cas. 740, 805, per Lord Penzance; *Richard v. Hupp* (Cal.), 37 Pac. Rep. 920; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 Pac. Rep. 623; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Lakeside Ditch Co. v. Crane*, 80 Cal.

181, 183, 22 Pac. Rep. 76; *Alta Land Co. v. Hancock*, 85 Cal. 219, 24 Pac. Rep. 645; *Sullivan v. Zeiner*, 98 Cal. 346; *Whiting v. Gaylord*, 66 Conn. 337, 344, 34 Atl. Rep. 85; *Parker v. Hotchkiss*, 25 Conn. 321; *Mitchell v. Rome*, 49 Ga. 19, 25; *Pierre v. Fernald*, 26 Me. 436, 442; *Gilmore v. Driscoll*, 122, 199, Mass. 207; *Turner v. Hart*, 71 Mich. 128, 38 N. W. Rep. 890, 15 Am. St. Rep. 243; *Burnham v. Kempton*, 44 N. H. 78, 90; *Holsman v. Boiling Spring B. Co.*, 14 N. J. Eq. 335; *Parker v. Foote*, 19 Wend. 309; *Mertz v. Dorney*, 25 Pa. St. 519; *Klein v. Gehrung*, 25 Tex. Supp. 232; *Smith v. Russ*, 17 Wis. 227, 84 Am. Dec. 739.

⁴ *Clayton v. Corby*, 2 Q. B. 813; *Onley v. Gardiner*, 4 M. & W. 496; *Ladyman v. Grave*, L. R. 6 Ch. 763; *Harbridge v. Warwick*, 3 Exc. 552; *Worthington v. Gimson*, 2 El. & El.

founded upon the use of the right by one who owned the entire premises, before the sale of any portion, and had the right to use it, as his own property.¹ “No man can have an easement in his own land. If the dominant and servient tenements are the property of the same owner, the exercise of the right, which in other cases would be the subject of an easement, is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure without in any way increasing or diminishing those rights. The dominant and servient tenements must, therefore, belong to different persons; immediately they become the property of one person, the inferior right of easement is merged in the higher title of ownership.”²

The time for acquiring an easement by prescription does not run while the dominant and servient estates are in the occupation of the same person;³ as where a tenant under a lease uses the demised tenement as servient to a tenement of his own or as servient to another tenement held of the same lessor;⁴ even though the occupation of the servient tenement be wrongful and without the privity of the true owner.⁵ “Possession is the larger right and includes or swallows up, as is said in some of the cases, all easements, they being in the nature of profits of the land. The effect

618, 624; *Pheysey v. Vicary*, 16 M. & W. 484.

Connecticut: *Whiting v. Gaylord*, 66 Conn. 337, 344, 34 Atl. Rep. 85; *Hickox v. Parmelee*, 21 Conn. 86, 98; *Tucker v. Jewett*, 11 Conn. 311, 322; *Manning v. Smith*, 6 Conn. 289.

Maine: *Mansur v. Blake*, 62 Me. 38.

Maryland: *Oliver v. Hook*, 47 Md. 301; *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353; *Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404.

Massachusetts: *Murphy v. Welch*, 128 Mass. 489; *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161; *Johnson v. Jordan*, 2 Met. 234, 37 Am. Dec. 85; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188.

New Hampshire: *Stevens v. Dennett*, 51 N. H. 324.

New Jersey: *Stanford v. Lyon*, 22 N. J. Eq. 33; *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108.

Ohio: *Hieatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280.

South Carolina: *Crosland v. Rogers*, 32 S. C. 130, 10 S. E. Rep. 874.

Virginia: *Scott v. Beutel*, 23 Gratt. 1.

West Virginia: *Standiford v. Goudy*, 6 W. Va. 364.

Wisconsin: *Mabie v. Matteson*, 17 Wis. 1.

¹ *Crosland v. Rogers*, 32 S. C. 130, 10 S. E. Rep. 874.

² *Stevens v. Dennett*, 51 N. H. 324, 330, per Foster, J.

³ *Harbridge v. Warwick*, 3 Exch. 552; *Bright v. Walker*, 1 Cr. M. & R., 211, 219; *Ladyman v. Grave*, L. R. 6 Ch. 763, 767.

⁴ *Outram v. Maude*, 17 Ch. D. 391; *Gayford v. Moffatt*, L. R. 4 Ch. 133; *Chamber Colliery Co. v. Hopwood*, 32 Ch. D. 549.

⁵ *Innes v. Ferguson*, 21 Ont. App. 323.

is a species of merger, which, when both tenements become vested in fee simple in the same owner, operates as an extinguishment of all easements forever.”¹

167. An easement by prescription must be appendant or appurtenant to an absolute estate in land, and not as annexed to it for a term of years; and on the other hand an easement by prescription cannot be acquired as against a particular occupier of the servient tenement, such, for instance, as a tenant for years. Such easement must be annexed to a dominant estate that is absolute and permanent, and must be acquired over a servient estate, that is absolute and permanent. An easement may be acquired against a lessee by grant which will be good against him for the remainder of his term.² Accordingly it has been held that neither at common law nor by the English Prescription Act can an easement by prescription be established against lessees of the crown, inasmuch as the easement would not bind the reversion;³ and it has been held, too, that the user of a way adversely and under a claim of right for more than twenty years over land in the possession of a lessee, who held under a lease for lives granted by the bishop of Worcester, gave no right as against the bishop, and did not affect the see. In such case, as the user could not give title as against all persons having estates in the land, it gave no title as against the lessee and the persons claiming under him. No title was gained by a user which did not give a valid title as against the bishop and permanently affect the land.⁴

168. Tenants in common owning a parcel of land may acquire by prescription an easement over the land of one of them owned by him in severalty. The use ought, in such case more than in ordinary cases, to appear to be under claim of right. The interest of the co-tenant whose land is made use of might lead him to permit such use, and on the question of fact a jury might think the use should be referred to such permission rather than to a claim of right. But in point of law, such user may be adverse. It may have been under the claim of a right appurtenant to the common property asserted by all the co-tenants and recognized by the tenant over whose land the right is claimed. The question whether the use

¹ Innes v. Ferguson, 21 Ont. App. 323, per Maclellan, J. A.

² Wheaton v. Maple [1893], 3 Ch. 48.

⁴ Bright v. Walker, 1 Cr. M. & R.

³ Wheaton v. Maple [1893], 3 Ch. 48, 211.
63.

was adverse is for the consideration of the jury as a question of fact.¹

And where a fishing place and fishing implements were owned by sundry persons as an unincorporated association, and the different interests were from time to time transferred as personal property, involving frequent changes in the membership of the association, it was held that the adverse use of a way to the fishing place by the successive owners was to be regarded as a continuous use, and that thereby a right of way might be acquired appurtenant to the fishing place and accruing to the benefit of the persons who should be owners at the end of the period of prescription.²

169. The right to use a part of a building may be acquired by prescription. A century ago, the State of Connecticut erected a state house upon land belonging to the town of Hartford, the cost being paid by the State, by the county of Hartford and by the citizens of Hartford. The building was thenceforth used by the State, by the county for its courts, and by the town and city of Hartford, for town and city purposes. The city and town ceased to occupy it in 1830 and 1832, but the State continued to occupy it until 1878, while the occupancy of the county still continued. On the last named date, the town, and in the following year, the State, conveyed to the city all their rights and property. It was held, that the city acquired the record title to the land subject to an easement in the county to use the building for its purposes as long as it pleased in the manner it had been accustomed to use it. This easement rests upon either of two grounds — prescription or estoppel. Here are all the elements of a prescription, a user under a claim of right acquiesced in by the owners of the land for more than fifteen years. There is an easement by estoppel also, for the town by permitting the erection of a building, for the purposes mentioned would be estopped from preventing its use for those purposes during the pleasure of the State and county. The State has abandoned its use, but the county has not done so and cannot be deprived of its right to such use.³

Where one of two owners of adjoining houses has for a period sufficient to establish a right by prescription continuously and exclusively used the spaces above and under his neighbor's side-hall and

¹ Bradley Fish Co. v. Dudley, 37 Conn. 136, per Seymour, J.

³ Hartford v. Hartford County, 49 Conn. 554.

² Bradley Fish Co. v. Dudley, 37 Conn. 136.

entry, as part of his attic and cellar, such spaces being within the lines of the latter's paper title, the former has acquired an easement in such spaces by prescription.¹

170. The projection of a cornice or the eaves of a house over the adjoining land of another, apparent and continuous for a length of time required by the statute to give title by prescription, creates a permanent easement.² Of course, the owner of the house acquires only an easement and not a title to the land of such other person under the eaves and cannot prevent him from building on that land, if he can do so without interfering with the eaves.³

Where the eaves of a house project over the land of another, the adverse occupation of the land in this way for a period sufficient to give title under the statute of limitations may mature into a right; but it is a question of fact for the jury whether the occupation of the land was such as to give the owner of the house an easement in the land. The circumstances might be such that the mere permissive continuance of the projection of the eaves would not be conclusive of the gaining of an easement.⁴

171. The right to maintain a line of shafting across a lot may be acquired by user for the prescriptive period, and this right includes the right to repair and renew the shafting from time to time.⁵

172. One may acquire, by prescription, the right to maintain a sign board upon another's building, or a post with a swinging sign on another's land. Thus where a sign board of an inn had been affixed to a building on a street corner adjoining the inn for forty years, the owner of the building was enjoined from removing it.⁶ The sign post and swinging sign of a village tavern, standing on the public common in front of the tavern, in time becomes a veritable incorporeal hereditament which the inn-keeper is entitled to maintain as against the public to whom the common belongs.⁷

One may by prescription acquire the right to maintain a nail or hook in the wall of a neighbor's house to which a clothes-line may be attached for the purpose of drying clothes.

¹ *Sorkin v. Sentman*, 162 Pa. St. 543, 29 Atl. Rep. 722.

² *Grace Methodist Epis. Church v. Dobbins*, 153 Pa. St. 294, 32 W. N. C. 19, 25 Atl. Rep. 1120; *Keats v. Hugo*, 115 Mass. 204, 216, 15 Am. Rep. 80.

³ *Keats v. Hugo*, 115 Mass. 204, 216, 15 Am. Rep. 80.

⁴ *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688.

⁵ *Rochester Electric Light Co. v. Rochester Power Co.*, 15 N. Y. Supp. 33.

⁶ *Moody v. Steggles*, 12 Ch. D. 261.

⁷ *Publicans' Signboards*, 47 Just. Peace, 545.

173. A right to use a turnpike road without the payment of toll may be acquired by prescription, and where the right appears to have been given by a turnpike company in consideration of receiving a right of way through the lands of the person to whom the right was given, it will be presumed that the easement of using the road without payment of tolls was not an easement in gross, but under a covenant entered into at the time of the construction of the road for a valuable consideration, and that such covenant ran with the land.¹

174. A right to cut ice upon a pond may be acquired by prescription as against the owner of a portion of the soil under the water, in case this right has been exercised continuously as appurtenant to the claimant's adjoining land, with the knowledge of the owner of the pond, for the period of limitation fixed by the statute. Such use of this right affords the presumption of a grant.² It is true that the right to take ice from water upon another's land may be a profit *à prendre*. But if such right is used as an adjunct to land bordering upon the pond purchased from the owner of it, for the purpose of conducting the business of cutting ice, it is a right in the nature of an easement and is attached to such land as an appurtenance.³

175. By prescription an easement to maintain a fence may be created in favor of the owner of one of two adjoining tracts of land, and a correlative duty may be imposed on the owner of the other tract to maintain the whole or a part of the division fence.⁴ "The easement seems to be founded upon the duty which at common law required the owner of a close, at his peril, to keep his cattle thereon, and to prevent them from trespassing on an adjoining

¹ Lucas v. Smithfield Turnpike Co., 36 W. Va. 427, 15 S. E. Rep. 182. See § 4, citing cases holding that such exemption is not an easement.

² Hoag v. Place, 93 Mich. 450, 53 N. W. Rep. 617.

³ Huntington v. Asher, 96 N. Y. 604, 48 Am. Rep. 652. See § 49.

⁴ Lawrence v. Jenkins, L. R. 8 Q. B. 274; Boyle v. Tamlyn, 9 D. & R. 430, 6 B. & C. 329; Star v. Rookesby, 1 Salk. 335; Sury v. Pigot, Pop. 166, 170, Noy, 84; Thayer v. Arnold, 4 Met. 589, 590; Binney v. Hull, 5 Pick.

503, 506; Minor v. Deland, 18 Pick. 266; Rust v. Low, 6 Mass. 90, 94, 97; Bronson v. Coffin, 108 Mass. 175, 185, 11 Am. Rep. 335, per Gray, J.; Harlow v. Stinson, 60 Me. 347; Knox v. Tucker, 48 Me. 373; Heath v. Ricker, 2 Me. 72; Castner v. Riegal, 54 N. J. L. 498, 24 Atl. Rep. 484; Ivins v. Ackerson, 38 N. J. L. 220, 222; Adams v. Van Alstyne, 25 N. Y. 232, 235.

A prescriptive right in such case is denied under the statute upon this subject in Glidden v. Towle, 31 N. H. 147; Wright v. Wright, 21 Conn. 329, 339.

close, and when the owner of the latter erected a fence for his protection and maintained it for the prescriptive period, he was deemed to have discharged his neighbor from his original duty and to have become bound to protect his own close by some grant or agreement, the evidence of which was lost by lapse of time.”¹

A covenant by a grantor in a deed of a part of his land to maintain forever a fence on the boundary line gives the grantee an easement in the adjoining land of the grantor which will run with the land and constitute an incumbrance upon it.² The obligation to maintain the fence, being a continuing charge upon the land, is not impaired by the omission for more than twenty years to perform it.³

The continuous maintenance of the whole of a division fence for the prescriptive period by the owner of one of the adjoining tracts raises a presumption of a grant or agreement for its perpetual maintenance.⁴ But the maintenance of a part only of a division fence for any length of time, under a statute which imposes on owners of adjoining lands the obligation of each to maintain a just proportion of such fence, is deemed, in the absence of an express agreement, to be referable to an assignment under the statute, and consequently no presumption will arise of a perpetual obligation to maintain that portion of the fence.⁵

A prescriptive obligation on the owner of land to maintain a partition fence is not destroyed by his becoming a tenant in common of the adjoining land.⁶

176. An easement of a burial lot, in a cemetery, may be acquired by prescription, and it seems that the burial of a dead body is the only possession of it necessary to the acquisition of the easement, and an inheritable title. “So long as the lot is inclosed as a burial place, or even, without inclosure, so long as gravestones stand marking the place as burial ground, the possession is, from the nature of the case, necessarily, and, therefore, in legal contemplation, actual, adverse and notorious. Moreover, there cannot be an actual ouster of possession by an intruder, or running of the statute of limitations

¹ Castner v. Riegel, 54 N. J. L. 498, 500, 24 Atl. Rep. 484, per Magie, J. And see Rust v. Low, 6 Mass. 90, 97.

² Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335.

³ Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335.

⁴ Castner v. Riegel, 54 N. J. L. 498, 24 Atl. Rep. 484; Knox v. Tucker, 48 Me. 373, 77 Am. Dec. 233.

⁵ Adams v. Van Alstyne, 25 N. Y. 232; Castner v. Riegel, 54 N. J. L. 498, 24 Atl. Rep. 484.

⁶ Binney v. Hull, 5 Pick. 503.

in his favor, while such gravestones stand there, indicating by inscription the previous burial of another.”¹

177. No easement can be acquired by prescription to have the boughs of a tree overhang another's land. “The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it.”² The owner of the land may cut off the branches of his neighbor's trees which overhang his land, though they have overhung his ground more than twenty years, and he may do this without giving any notice to his neighbor. In a recent case before the English Court of Appeal, Lindley, L. J., stated the law very concisely saying: “The law on the subject is, in my opinion, as follows: The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land, and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice, so long as he confines himself and his operations to his own land including the space vertically above and below its surface.”³

In the case just cited the question whether notice should be given before lopping off the boughs of overhanging trees, was much discussed and all the cases bearing upon the question were considered. Kay, Lord Justice, states the result of the authorities as follows:⁴ “The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this an action on the case would lie. Also, the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so. Whether he may do so without notice is not stated distinctly in any of the cases; but on the whole I think that this is the mean-

¹ Hook v. Joyce, 94 Ky. 450, 22 S. W. Rep. 651. See § 11.

² Gale on Easements, 6th ed., p. 461; Norris v. Baker, 1 Rolle, 393; Robinson v. Clapp, 65 Conn. 365.

³ Lemmon v. Webb, L. R. [1894], 3 Ch. 1, 14. See Jones on Real Property, § 1614.

⁴ Lemmon v. Webb, L. R. [1894], 3 Ch. 1, 24.

ing. In the older cases it is said that the owner of the land encroached on may cut the boughs, and nothing is said about giving previous notice, and I think that the true reading of *Pickering v. Rudd*¹ is, that he may do so without notice if he can do it without trespassing upon the land in which the tree grows. I come very reluctantly to this conclusion. I think the legal question very doubtful. In my opinion it would be better if the law were, that before cutting a neighbor's trees notice should be given in order to afford to the owner of the trees an opportunity of removing the boughs which occasion a nuisance. Whether that is the law or not, no one but an ill-disposed person would do such an act without previous notice."

The case of cutting the roots and lopping the branches of a tree that encroaches upon the land of another seems to be an exception to the general rule that a nuisance cannot be abated without notice;² and the reason for the exception seems to be that the roots of the tree may be cut and the overhanging branches lopped off without entering or trespassing on the land of the owner of the tree. In the case from which the above quotations are made, *Lopez, L. J.*, says: "The distinction, in my judgment, is this: A man may without previous notice cut the boughs of his neighbor's trees which overhang his land, if he can do so without trespassing on his neighbor's land; but he cannot justify a trespass on another's land for the purpose of cutting boughs or roots projecting into his own land without previous notice."³ In a case which is an authority for this view an action was brought for breaking, lopping and damaging a Virginian creeper, which grew in the plaintiff's garden and spread over the defendant's house. The defendant cut away that portion of the creeper which was over his house without touching the surface of the plaintiff's premises. The defendant justified the cutting on the ground that the creeper was unlawfully spreading over his house, and that he removed it because it was an incubrance on his premises; the plaintiff replied that the defendant had used greater force than was necessary. There was no suggestion that previous notice to the plaintiff was necessary before the defendant was justified in cutting the creeper.⁴

¹ 4 Camp. 219, 1 Stark. 56.

³ *Lemmon v. Webb*, L. R. [1894], 3

² The leading case is *Jones v. Williams*, 11 Mees. & W. 176.

Ch. 1, 17.

⁴ *Pickering v. Rudd*, 4 Camp. 219 1 Stark. 56.

178. The right to maintain a nuisance cannot be acquired by prescription.¹ It seems that a right to continue a noise cannot be acquired at all except by some express or implied agreement between the parties concerned.² Under the English prescription act it is said that an easement within the act must be a right of utility and benefit.³ Making a noise is not such a right. A confectioner had for more than twenty years used a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt as a nuisance and were not complained of, until the physician erected a consulting room at the end of his garden when the noise and vibration became a nuisance to him. He accordingly asked for an injunction; and it was held that the defendant had not acquired a right to an easement of making a noise, and the injunction was granted.⁴

III. *Use by License or by Permission.*

179. No easement by prescription can be acquired where the privilege is used by the express or implied permission or license of the owner of the land.⁵ But a user having its origin in license or permission may afterwards become adverse under a claim of right, and when the adverse user has been exercised for the period prescribed by the statute of limitations, it ripens into a title.⁶ The ques-

¹ 1 Wood on Nuisances, p. 40, 105; Mumford v. Oxford, W. & W. R. Co., 1 H. & N. 34, per Pollock, C. B.; Rex v. Cross, 3 Camp. 225, per Lord Ellenborough; Weld v. Hornby, 7 East, 194; Fowler v. Sanders, Cro. Jac. 446; Commonwealth v. Upton, 6 Gray, 473; People v. Cunningham, 1 Den. 524, 536, 43 Am. Dec. 709; Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631. See Dana v. Valentine, 5 Met. 8.

² Sturges v. Bridgman, 11 Ch. D. 855.

³ Mounsey v. Ismay, 3 H. & C. 486.

⁴ Sturges v. Bridgman, 11 Ch. D. 852, 855.

⁵ See § 282; Beasley v. Clarke, 2 Bing. N. C. 705; Tickle v. Brown, 4 Ad. & El. 369; Monmouth Canal Co. v. Harford, 1 C. M. & R. 614, 631; Arkwright v. Gell, 5 M. & W. 203; Mc-

Creary v. Boston & M. R. Co., 153 Mass. 300, 26 N. E. Rep. 864, 11 L. R. A. 359; Smith v. Miller, 11 Gray, 145; Sumner v. Tileston, 7 Pick. 198; Lanier v. Booth, 50 Miss. 410; Curtis v. La Grande Hydraulic Water Co., 20 Oreg. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484; Stevens v. Dennett, 51 N. H. 324; Watkins v. Peck, 13 N. H. 360; Cronkhite v. Cronkhite, 94 N. Y. 323; Wiseman v. Lucksinger, 84 N. Y. 31, 44, 38 Am. Rep. 479; Crounse v. Wemple, 29 N. Y. 540, 542; Lehigh Valley R. Co. v. McFarlan, 30 N. J. Eq. 180; Felton v. Simpson, 11 Ired. 84.

⁶ Barbour v. Pierce, 42 Cal. 657; Parish v. Kaspere, 109 Ind. 586, 10 N. E. Rep. 109; House v. Montgomery, 19 Mo. App. 170; Wiseman v. Lucksinger, 84 N. Y. 31, 44, 38 Am. Rep. 479.

tion in each case is whether the use, though commencing in consent, is exercised as of right. The character of the use commencing under consent depends upon the language used and the manner of the enjoyment. If the language is such as to create a license only the enjoyment is regarded as permissive and not as of the right, and no title is acquired under it.¹

If, however, the language is such as to give a right of enjoyment and the use is continued under a claim of right, the use is adverse and may ripen into a title by prescription. Thus where a well was dug at the mutual expense of the owners of adjacent estates upon the land of one of them, under an agreement that the same should be for the mutual benefit of the parties, and repairs of the same were made at their joint expense and the owners of the dominant estate had enjoyed the use of the well for more than fifty years, it was held, that the use commenced under a grant of right and was continued under a claim of right, and the use was, therefore, adverse. The jury were properly instructed that if they were satisfied that the original parties dug the well under a verbal contract that they should own and have the right to use the well, and that thereupon the owners of the dominant estate have since continued the use under a claim of right, such use was adverse and had ripened into a title.²

The use of a way under a parol consent given by the owner of the servient estate to use it as if it were legally conveyed, is a use under a claim of right.³ An occupation of land under a parol gift from the owner is an occupation as of right.⁴ And so the use of an easement having its origin in a parol gift or grant, if continued for the requisite period, is a use as of right and if continued long enough will ripen into a title.⁵ "It must appear that the privilege was not used under a letting, or license, or in any way in subordination to the title of the legal owner. The distinction is, whether I grant you a right over or upon my property to use as your own or as my own — as an enjoyment and privilege belonging to you or as belonging to me. The grantee or donee must accept and enjoy the use of the premises as his own, and because he claims it to be his

¹ Cheever v. Pearson, 16 Pick. 266; Stearns v. Janes, 12 Allen, 582; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479.

² Stearns v. Janes, 12 Allen, 582.

³ Ashley v. Ashley, 4 Gray, 197.

⁴ Sumner v. Stevens, 6 Met. 337; Webster v. Holland, 58 Me. 168.

⁵ Jewett v. Hussey, 70 Me. 433.

own, and because the grantor sold or gave it to him to be his own, as a perpetual thing.”¹

180. No length of enjoyment of a privilege under a license can ripen into an easement.² A privilege, so commencing, may afterwards be claimed adversely as a matter of right, but such a claim if not expressly made must be shown by an open and notorious possession or by other circumstances which would indicate an adverse enjoyment under a claim of right.³ Thus the privilege granted by a city to an individual to place water-pipes under a street for the purpose of conveying water from a spring cannot ripen into an easement by prescription by mere use and enjoyment for any length of time because they are not open and notorious.⁴

Where by license of the owner of the land upon a creek, the owner of a mine constructed a ditch and used the water for mining purposes, but the riparian owner reserved the right to use the water a part of each year for his own purposes, an adverse use of the water cannot be established unless it is shown that the use of the water by the mine owner has been in hostility to the use of it by the owner of the land under such reservation. The mine owner in such case, in order to establish a prescriptive right to the water must show that his use of it was in defiance of any right upon the part of the owner to use it for any purpose; that he wholly ignored the owner's right to use it at all, and that the owner acquiesced in his exclusive use.⁵

181. A use commencing in a license also becomes adverse after a revocation of the license.⁶ The revocation need not be formal.

¹ Jewett v. Hussey, 70 Me. 433, 436, 876; Nowlin v. Whipple, 120 Ind. 596, per Peters, J. And see Arbuckle v. Ward, 29 Vt. 43. 22 N. E. Rep. 669.

² Wood v. Leadbitter, 13 M. & W. 838; Medford First Parish v. Pratt, 4 Pick. 221; Bachelder v. Wakefield, 8 Cush. 243; Smith v. Miller, 11 Gray, 145; Morse v. Williams, 62 Me. 445; Nelson v. Nelson, 41 Mo. App. 130; Lanier v. Booth, 50 Miss. 410; Luce v. Carley, 24 Wend. 451, 35 Am. Dec. 637; Colvin v. Burnet, 17 Wend. 564, 569; Eckerson v. Crippen, 39 Hun, 419; Demuth v. Amweg, 90 Pa. St. 181; Harkness v. Woodmansee, 7 Utah, 227, 26 Pac. Rep. 291; Conner v. Woodfill, 126 Ind. 85, 25 N. E. Rep. 505; Elster v. Springfield, 49 Ohio St. 82, 30 N. E. Rep. 274; McAllister v. Pickup, 84 Iowa, 65, 50 N. W. Rep. 556; Estes v. Long, 71 Mo. 605; Budd v. Collins, 69 Mo. 129; Nelson v. Nelson, 41 Mo. App. 130.

³ Elster v. Springfield, 49 Ohio St. 82, 30 N. E. Rep. 274.

⁴ Elster v. Springfield, 49 Ohio St. 82, 30 N. E. Rep. 274.

⁵ Huston v. Bybee, 17 Oreg. 140, 20 Pac. Rep. 51.

⁶ Eckerson v. Crippen, 110 N. Y. 585, 18 N. E. Rep. 443; Pitzman v. Boyce, 111 Mo. 387, 33 Am. St. Rep. 536; Thoemke v. Fiedler, 91 Wis. 386.

An interference with the exercise of the license may be a revocation of it; as in case one has permitted his neighbor to use a sewer on his land, he revokes the license by severing the connection between the sewer on his own land and the adjoining land of his neighbor.¹

182. But an easement may commence in a parol grant of the privilege, and if the grantee uses it for the prescriptive period, and the grantor acquiesces in such use, such exercise of the privilege gives a prescriptive right.² Though an easement cannot be granted by parol, an entry under such a grant and the enjoyment of the privilege granted are under a claim of right. Thus if a right to use a ditch over the land of another for conducting water for irrigation is purchased under a parol contract, and the right is used by the purchaser as if it had been legally conveyed to him, it will be presumed that he used it as if right, and his title will be perfected by such use for the requisite period.³

Where the owner of a field told his neighbor that if he would dig at a place pointed out to him and find water he might lay logs and conduct it to his barnyard, and might have the water, and he accordingly conveyed the water to his premises, and used it for a sufficient length of time to give a prescriptive title, it was held that he acquired an absolute right to the water to the extent of such use. The neighbor's use of the right to take the water was adverse, continuous, open and notorious under a claim of ownership.⁴

183. If an actual grant by deed is shown, there can be no question of prescription.⁵ A deed to a railroad company, of land, to be used for laying its track in which the grantor was permitted to use certain crossings is inadmissible for the purpose of proving a right of way over the crossings acquired by the grantor by adverse use. The deed, on the contrary, proves a right to use the crossings under and by virtue of the deed alone.⁶

¹ Pitzman v. Boyce, 111 Mo. 387, 19 S. W. Rep. 1104, 33 Am. St. Rep. 536.

² Ashley v. Ashley, 4 Gray, 197; Sumner v. Stevens, 6 Met. 337, Arbuckle v. Ward, 29 Vt. 43; Jewett v. Hussey, 70 Me. 433; Legg v. Horn, 45 Conn. 409. In Wiseman v. Luck-singer, 84 N. Y. 31, 38 Am. Rep. 479, a parol agreement that one might drain through certain land was regarded as giving not a permanent privilege but a temporary one, in the nature of a license.

³ Coventon v. Seufert, 23 Oreg. 548, 32 Pac. Rep. 508.

⁴ Blaine v. Ray, 61 Vt. 566, 18 Atl. Rep. 189. And see Legg v. Horn, 45 Conn. 409. See, however, Taylor v. Gerrish, 59 N. H. 569, where a similar statement was regarded as a license might be revoked.

⁵ Chamber Colliery Co. v. Hopwood, 32 Ch. D. 549.

⁶ Hoyle v. New York & N. E. R. Co., 60 Conn. 28, 22 Atl. Rep. 446.

184. The fact that repairs have been made at the joint expense of the owners of the servient and of the dominant estates, does not, as a matter of law, prevent the use of it by the latter from being adverse. The owner of the servient estate may as well have joined because he yielded to a paramount claim, as on the footing of a license given by him and accepted by the owner of the dominant estate. In the case of a drain even if its continuance was not a trespass, or adverse, the use of it over the servient land may have been adverse just as easily when the owner of the servient estate partly paid for it, as if the owner of the dominant estate had laid it wholly at his own expense.¹

185. The burden of proof is upon one claiming an easement otherwise than by express grant to prove all the facts necessary to establish the right.² Where the nature of the use and the situation of the property is such that there is a doubt whether the use was adverse and under a claim of right, it is for the jury and not the court to say whether upon the evidence and circumstances the user has been under a claim of right and adverse.³

Where a railroad company has maintained a culvert so constructed as to cause a farmer's land to be overflowed, the burden is on the railroad company to show, not that the overflow has constantly extended over the farmer's land for twenty years, but that at regular or irregular intervals the water has overflowed the land in controversy to the very same extent, so as to have rendered the company liable to an action in the nature of trespass at any time during that period.⁴

The fact that one who claims an easement by prescription applied to the owner of the land upon which the right was exercised to purchase the right, is evidence, if unexplained, that his enjoyment of the right was not adverse.⁵

186. A presumption that the use was under a claim of right, and adverse arises from an undisputed use of an easement for the estab-

¹ *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. Rep. 197, per Holmes, J. *American Company v. Bradford*, 27 Cal. 360; *Bowen v. Guild*, 130 Mass. 121, 124; *Knights of Pythias v. Lead-*

² *American Co. v. Bradford*, 27 Cal. 360; *Oliver v. Hook*, 47 Md. 301; *O'Neil v. Blodgett*, 53 Vt. 213; *Texas W. Ry. Co. v. Wilson*, 83 Tex. 153, 18 S. W. Rep. 325; *Carmody v. Mulrooney*, 87 Wis. 552, 58 N. W. Rep. 1109. *Emery v. Raleigh & G. R. Co.*, 102 N. C. 209, 9 S. E. Rep. 139.

³ *Plimpton v. Converse*, 42 Vt. 712; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156. And see *Colvin v. Burnet*, 17 Wend. 564.

lished period of prescription;¹ and the burden is upon the party alleging that the use has been by virtue of a license or permission to prove that fact by affirmative evidence.² An uninterrupted use for the requisite period unexplained is sufficient to establish a right by prescription and to authorize a presumption of a grant. After such period of enjoyment the owner of the land has the burden of proving that the use of the easement was under some license, indulgence or special contract inconsistent with a claim of right by the other party.³ Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts, or any of them, were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a non-appearing grant; otherwise the presumption stands as sufficient proof, and establishes the right.⁴

IV. *Interruption of Use and Resistance to It.*

187. An interruption to the enjoyment of a right before an easement by prescription has been acquired, defeats the acquisition of it;⁵ but after the acquisition is complete, no interruption or ces-

¹ Tyler v. Wilkinson, 4 Mason, 397; Cox v. Forrest, 60 Md. 74, 79; Kripp v. Curtis, 71 Cal. 62, 11 Pac. Rep. 879; Union Water Co. v. Crary, 25 Cal. 504, 509, 85 Am. Dec. 145; Parker v. Foote, 19 Wend. 309; Colburn v. Marsh, 68 Hun, 269, 22 N. Y. S. 990; Nicholls v. Wentworth, 100 N. Y. 455, 3 N. E. Rep. 482; Ward v. Warren, 82 N. Y. 265, affirming 15 Hun, 600; Hoag v. Place, 93 Mich. 450, 53 N. W. Rep. 617; Conyers v. Scott, 94 Ky. 123, 21 S. W. Rep. 530; Thomas v. Bertram, 4 Bush. 317; Carmody v. Mulrooney, 87 Wis. 552, 58 N. W. Rep. 1109; Esling v. Williams, 10 Pa. St. 126; Pierce v. Cloud, 42 Pa. St. 102, 82 Am. Dec. 496; Tracy v. Atherton, 36 Vt. 503; Plimpton v. Converse, 42 Vt. 712; Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45; Blake v. Everett, 1 Allen, 248; Boliver Manuf. Co. v. Neponset Manuf. Co., 16 Pick. 241; White v. Chapin, 12 Allen, 516; Stearns v. Janes, 12 Allen, 582; Olney v. Fenner, 2 R. I. 211, 57 Am.

Dec. 711; School Dist. v. Lynch, 33 Conn. 330, 334.

² Barnes v. Haynes, 13 Gray, 188, 74 Am. Dec. 629; O'Daniel v. O'Daniel, 88 Ky. 185, 10 S. W. Rep. 638; Miller v. Garlock, 8 Barb. 153; Hammond v. Zehner, 21 N. Y. 118; Nicholls v. Wentworth, 100 N. Y. 455, 3 N. E. Rep. 482; Colburn v. Marsh, 68 Hun, 269, 22 N. Y. S. 990; Arbuckle v. Ward, 29 Vt. 43.

³ French v. Marstin, 24 N. H. 440, 57 Am. Dec. 294; Garrett v. Jackson, 20 Pa. St. 331; Carmody v. Mulrooney, 87 Wis. 552, 58 N. W. Rep. 1109.

⁴ Barnes v. Haynes, 13 Gray, 188, 74 Am. Dec. 629, per Shaw, C. J.

⁵ Kilburn v. Adams, 7 Met. 33, 39 Am. Dec. 754; Pollard v. Barnes, 2 Cush. 191; Sargent v. Ballard, 9 Pick. 251; Carlisle v. Cooper, 19 N. J. Eq. 256; Hesperia Land & W. Co. v. Rogers, 83 Cal. 10, 23 Pac. Rep. 196; Chapel v. Smith, 80 Mich. 100, 45 N. W. Rep. 69; Doyle v. Wade, 23 Fla.

sation of enjoyment except for the full period of prescription will destroy the easement unless there is an intention to abandon it. What period of interruption or cessation of enjoyment will defeat the acquisition of the right by prescription depends upon the nature of the right and the attendant circumstances.¹ "Whatever breaks the continuity of the possession and enjoyment of an easement, whether by a cessation to enjoy it, or by any act of the owner of the servient tenement, destroys altogether the effect of the previous user."² Thus if one has had adverse use of a right of way for two years and then the adverse enjoyment is interrupted for some time, when his successor in title enjoys the way for eighteen years, these two periods cannot be joined in order to make up the twenty years required to give a prescriptive right.³ "The whole object of requiring twenty years instead of six or two for acquiring title to the lands by possession, and to easements by enjoyment will be frustrated if the title can be gained by enjoyment at intervals during the twenty years, intermitted without any evidence of intention to abandon. And in no case is it permitted to annex the possession of lands, or the enjoyment of an easement at one time, with such possession or enjoyment at another time, so as to make up the twenty years."⁴

188. It is not essential that a user in every one of the years required to establish a prescriptive right should be shown. If, from any accident, or merely for the convenience of the claimant of the right, he has not exercised it in some years, probably such pretension would not defeat the right, if the user was shown to have begun early enough and to have continued whenever it was desired during the whole prescriptive period.⁵

90, 1 So. Rep. 516, 11 Am. St. Rep. 334; Watt v. Trapp, 2 Rich. L. 136; Taylor v. Hampton, 4 McCord, 96, 17 Am. Dec. 710; Mason v. Davison, 27 Nova Scotia, 84.

¹ Carlisle v. Cooper, 19 N. J. Eq. 256.

² Pollard v. Barnes, 2 Cush. 191, 199, per Wilde, J.

³ Kilburn v. Adams, 7 Met. 33, 39 Am. Dec. 754.

⁴ Carlisle v. Cooper, 19 N. J. Eq. 256, 262, per Zabriske, Ch.

⁵ Earl De La Warr v. Miles, 17 Ch. D. 535, per James, L. J. In the same case, however, Brett, L. J., said: "I

think it is necessary for the defendant to show that the right was exercised year by year, and that if, as regards some part of the intermediate period, he failed to show that the right has been exercised, he would not prove that which lies upon him under the statute. If, therefore, it had been shown (the case relating to a right of common), that he or his predecessors had for a year or more submitted to tramps or gypsies, or other people who were undoubtedly trespassers, cutting the fern on their own account, and appropriating it to themselves, and, instead of

Mere intermission of use is not an interruption. The claimant of a prescriptive right to use a ditch for irrigation over another's land need not show that his use has been continuous, but it is sufficient for him to show the use of the water when needed for irrigation during the cropping season. Such intermission or omission of use does not break the continuity of use.¹

189. Mere intermission of use is not an interruption, unless it amounts to an abandonment. Non-user is voluntary, an interruption is from without. Non-user does not affect the right to the easement, unless the circumstances are such as to raise an inference of an abandonment of the right. "Interruption means an obstruction, not a cesser or intermission, or anything denoting a mere breach in time. There must be an overt act, indicating that the right is disturbed. No necessary inference arises from a cesser during two, three or seven years."²

Where one claimed an easement in land adjoining his mill, which he had used as part of his mill yard for piling logs, lumber and boards, but it appeared that for six years out of the twenty necessary to give him a prescriptive right he had made no use of such land, it was held that such omission prevented his acquiring a right by prescription, although the land was not occupied by any one else during any part of the twenty years, and that no notice had been given to him by the landowner to cease occupying, and that the latter had not at any time done any act indicating an intention to interrupt the millowner in the use of land for a mill yard. The landowner had good reason to believe from the total cessation of the enjoyment of the easement for so long a period, and from the

cutting the litter by their own servants, had bought it from those people as something which they had a right to sell — if it had been shown that for a year or two years without cutting any litter during that year, or those two years by his own servants at all, I should have thought that there was a gap made in the user for sixty years, and that he could not succeed under his plea." See also *Bodfish v. Bodfish*, 105 Mass. 317.

¹ *Hesperia Land & W. Co. v. Rogers*, 83 Cal. 10, 23 Pac. Rep. 196.

² *Carr v. Foster*, 3 Ad. & El. N. S.

581, 588, per Williams, J., where it was held that omission to use common of pasture for two years, would not prevent title from accruing by prescription." This case, however, was decided under a statute which provided that no interruption except acquiesced in for one year after notice, should prevent the accruing of title by prescription. And see *Lawson v. Langley*, 4 Ad. & El. 890; *Hall v. Swift*, 4 Bing. N. C. 381; *Bodfish v. Bodfish*, 105 Mass. 317; *Dana v. Valentine*, 5 Met. 8; *Pollard v. Barnes*, 2 Cush. 191, 197.

attendant circumstances that the millowner had abandoned his claim.¹

190. An interruption of the continuous enjoyment of an easement for necessary repairs is not an interruption that affects the rights of the claimant of the right.² The very act of repairing or rebuilding shows an intention to maintain and to resume the exercise of the easement.³ Where the easement claimed is the right to flow land, the washing out of the claimant's dam does not stop the running of prescription, if he repairs it and resumes the use within a reasonable time.⁴

A temporary or accidental interruption of the user does not stop the running of the prescription, if there is no intention of abandoning the easement, and the use of it is resumed within a reasonable time after such temporary interruption.⁵

191. There is an interruption of an easement in case it is exchanged for another easement of the same kind.⁶ Thus, where one had the use of a ditch for the drainage of water from his land over that of another for sixteen years when a new ditch was made near the former which was thereupon filled up, and he used the new ditch for five years, and then claimed a right to use it by reason of a user for twenty years, it was held that he had not thereby acquired a prescriptive right to drain the surface water of his land over the land of his neighbor, for the time of the use of the new ditch could not be added to the time of the use of the old one, to make upon the prescriptive period of twenty years.⁷

Where one after using a private way over the land of another abandoned it and used another way over the same land, though he did this at the request of the owner, he cannot tack the two periods of use together so as to establish an easement by prescription.⁸ To acquire a prescriptive right of way by consent and uninterrupted use, the use must relate strictly to the identical land over which the right is claimed. When he voluntarily abandons

¹ Pollard v. Barnes, 2 Cush. 191.

² Wood v. Kelley, 30 Me. 47; Alcorn v. Sadler, 71 Miss. 634, 42 Am. St. Rep. 484; Haag v. Delorme, 30 Wis. 591; Gerenger v. Summers, 2 Ired. L. 229.

³ Wood v. Kelley, 30 Me. 47, 57.

⁴ Haag v. Delorme, 30 Wis. 591.

⁵ Haag v. Delorme, 30 Wis. 591.

⁶ See § 295.

⁷ Totel v. Bonnefoy, 123 Ill. 653, 14 N. E. Rep. 687, 5 Am. St. Rep. 570.

⁸ Peters v. Little, 95 Ga. 151, 22 S. E. Rep. 44; Follendore v. Thomas, 93 Ga. 300, 20 S. E. Rep. 329; Mason v. Davison, 27 Nova Scotia, 84.

the way over the first strip, although he did so with the consent and at the request of owner, the prescription ceased to run in his favor as to that particular strip. As to the second strip the use not continuing for the requisite time, he acquired no prescriptive right of way over it.

192. No easement by prescription can arise where it appears that the owner of the servient estate has habitually interrupted the use whenever he thought proper to do so;¹ or has even frequently remonstrated against its exercise.²

Where the use of the right has been exercised by force or in the face of protests and in defiance of resistance, a grant cannot be presumed and no easement can be acquired by prescription.³ "An easement in the land of another can be acquired by adverse user only, with the acquiescence of the owner of the land, in its exercise under a claim of right, *per patientiam veri domini, qui scivit et non prohibuit, sed permisit de consensu tactio*. From such use of an easement for twenty years the law will presume a non-appearing grant. But before the lapse of that period, if the owner of land, by a verbal act on the premises in which the easement is claimed, resists the exercise of the right and denies its existence, the presumption of a grant is rebutted, his acquiescence in the right claimed is disproved, and the essential elements of a title to an easement by adverse use are shown not to exist."⁴

193. There is some conflict of authority as to what denials of the easement, by the landowner, constitute an interruption of the right. There is strong authority for the position that mere verbal denials of the right, and verbal protests to its exercise are not sufficient to interrupt the enjoyment of it, unless supported by some physical act.⁵ Thus where a mill owner had for the full prescriptive period exercised the right to draw water from a dam above his

¹ Kirschner v. Western & Atl. R. Co., 67 Ga. 760; Lehigh Val. R. Co. v. McFarlan, 30 N. J. Eq. 180, 43 N. J. L. 605.

² Smith v. Miller, 11 Gray, 145.

³ Eaton v. Swansea Water Works Co., 17 Q. B. 267, 275; Livett v. Wilson, 3 Bing. 115; Stillman v. White Rock Manuf. Co., 3 Woodb. & M. 538, 549; Powell v. Bagg, 8 Gray, 441, 69 Am. Dec. 262; Lehigh Val. R. Co. v.

McFarlan, 30 N. J. Eq. 180, 43 N. J. L. 605.

⁴ Powell v. Bagg, 8 Gray, 441, 443, 69 Am. Dec. 262, per Bigelow, J.

⁵ Angus v. Dalton, 6 App. Cas. 740; Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605; Demuth v. Amweg, 90 Pa. St. 181; Kimball v. Ladd, 42 Vt. 747; School District v. Lynch, 33 Conn. 330, 334.

mill belonging to others and in their direct control, it was held that their verbal denial of the right and their objection to its exercise did not in any way interrupt the enjoyment of it by the lower mill owner.¹ "The whole doctrine of prescription is founded on public policy. It is a matter of public interest that title to property should not long remain uncertain and in dispute. The doctrine of prescription conduces, in that respect, to the interest of society, and at the same time is promotive of private justice by putting an end to and fixing a limit to contention and strife.

"Protests and mere denials of right are evidence that the right is in dispute, as distinguished from a contested right. If such protests and denials, unaccompanied by an act which in law amounts to a disturbance and is actionable as such, be permitted to put the right in abeyance, the policy of the law will be defeated, and prescriptive rights be placed upon the most unstable of foundations. Suppose an easement is enjoyed, say, for thirty years. If after such continuance of enjoyment the right may be overthrown by proof of protests and mere denials of the right, uttered at some remote but serviceable time during that period, it is manifest that a right held by so uncertain a tenure will be of little value. If the easement has been interrupted by any act which places the owner of it in a position to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead or the facts have faded from

¹ Kimball v. Ladd, 42 Vt. 747, 756, Barrett, J., saying: "His denying the right and objecting to the claim of the other party, at the same time that he, in fact, was permitting the water to flow through his own flume and gates, over which he had entire control, in a manner answerable to the claim of the other party, suggests the expression of the poet in relation to one of his heroines, 'Saying, I will ne'er consent, consented.' * * *

"The upper mill owners, by permitting the water thus to run, must be regarded as acquiescing in its running, whatever they may have said by way of denying the right as claimed by the other party."

The learned judge distinguishes the

case in hand from that of Powell v. Bagg, 8 Gray, 441, 69 Am. Dec. 262, where a verbal protest was held to effect an interruption of the enjoyment of the easement. The question was as to the right of the defendant to dig up the soil of the plaintiff's land for the purpose of repairing an aqueduct running through it. This could be acquired only by a user consisting in acts on the part of the defendant, of going upon and digging up the soil with the acquiescence of the plaintiff. If he made no objection to them, he virtually acquiesced in them. If he objected and denied the right, this was all he could do to manifest want of acquiescence, unless he interposed with actual force, and this he was not required to do.

recollection, he has his own folly and supineness to which to lay the blame. But if by mere protests and denials by his adversary, his right might be defeated, he would be placed at an unconscionable disadvantage. He could neither sue and establish his right, nor could he have the advantage usually derived from long enjoyment in quieting titles. Protests and remonstrances by the owner of the servient tenement against the use of the easement rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruptions or obstructions of the enjoyment.”¹

If the verbal protest and denials of the right are followed by any acts on the part of the land owner in support of his protests, all the circumstances should be submitted to the jury upon the question whether there has been such an acquiescence by the landowner in the enjoyment of the easement as fairly indicates a grant.²

194. On the other hand there is authority that resistance to the use of an easement, by verbal denials of the right and protests, is sufficient to prevent an acquisition of the right by prescription.³ Where an owner of land claimed the right by adverse use and enjoyment to conduct water by an aqueduct from adjoining land belonging to another, and for this purpose to enter and dig up the soil of such adjoining land for the purpose of repairing the aqueduct, he was forbidden by the owner of the adjoining land to enter thereon and was ordered off; and it was held that such verbal orders, though unaccompanied by further acts, were admissible in evidence of an interruption of an easement.⁴

¹ Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605, 629, per Depue, J.

² Connor v. Sullivan, 40 Conn. 26, 16 Am. Rep. 10.

³ Stillman v. White Rock Manuf. Co., 3 Woodb. & M. 538; Livett v. Wilson, 3 Bing. 115; Lehigh Valley R. Co. v. McFarlan, 30 N. J. Eq. 180. not followed, however, in 43 N. J. L. 605, 11 Am. & Eng. R. Cases, 509; Powell v. Bagg, 8 Gray, 441, 69 Am. Dec. 262; Smith v. Miller, 11 Gray, 145; Workman v. Curran, 89 Pa. St. 226; Nichols

v. Aylor, 7 Leigh, 546; Field v. Brown, 24 Gratt. 74; Chicago & N. W. R. Co. v. Hoag, 90 Ill. 339.

⁴ Powell v. Bagg, 8 Gray, 441, 443; 69 Am. Dec. 262. “It was not necessary for the plaintiff to commit an assault and battery on the defendant or his servants, or to use actual force to eject them from the premises in order to disturb and break the continuity of possession or use, and prevent it from ripening into a title by lapse of time.” Per Bigelow, J.

195. The pendency of a suit to determine the validity of a claim to an easement is sufficient to repel the presumption of a grant, which otherwise arises from the use and enjoyment of the way for the prescriptive period.¹ A prescription of a grant of an easement cannot arise against a land owner while he is contesting the claim. If a suit by the land owner against the claimant of the easement is prosecuted and the latter is convicted, acquiesces in the conviction and pays a fine, the conviction becomes evidence of an acknowledgment on the part of the claimant that his use of the privilege was not of right.²

196. Notices may be sufficient to prevent the acquisition of an easement by prescription. One cannot acquire a right of way over a strip of land belonging to a railroad company as part of its way, where the railroad company has actually and continuously occupied such land and has maintained notices that the property was private, though the claimant has used such land for a passageway for more than thirty years.³ The mere fact that the defendant company knew that the public and the complainant were passing and repassing there would not create a right in the public or complainant to continue such passage.⁴

In some States the statutes provide for notices which shall have the effect of preventing the acquisition of easements by continuous use.⁵

197. The term of enjoyment requisite for the prescription is deemed to be uninterrupted when it is continued from ancestor to heirs, and from seller to buyer.⁶ In other words, the several periods of enjoyment of an easement by successive occupants holding by privity of estate may be counted to make up the requisite period of prescription. All that is required to make out a prescriptive title by the possessor is evidence that the possession has been

¹ Workman v. Curran, 89 Pa. St. 226;

Postlethwaite v. Payne, 8 Ind. 104.
And see Langford v. Poppe, 56 Cal. 73.

² Eaton v. Swansea Water Works Co., 17 Q. B. 267.

³ Andries v. Detroit G. H. & M. Ry. Co., 105 Mich. 557, 63 N. W. Rep. 526.

⁴ Andries v. Detroit G. H. & M. Ry. Co., *supra*; Elliott, Roads & Streets, p. 130; Stewart v. Frink, 94 N. C. 487, 55 Am. Rep. 619.

⁵ § 161.

⁶ Cole v. Bradbury, 86 Me. 380, 29 Atl. Rep. 1097; Leonard v. Leonard, 7 Allen, 277, 280; Sargent v. Ballard, 9 Pick. 251, 256; Hill v. Crosby, 2 Pick. 466, 13 Am. Dec. 448; Kent v. Waite, 10 Pick. 138; Melvin v. Whiting, 13 Pick. 184; Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45; Coventon v. Seufert, 23 Oreg. 548, 32 Pac. Rep. 508.

legally continued from one owner to the other. If, however, there is not privity of title between the successive owners, there is no continuity of possession.¹

198. An easement cannot be acquired by prescription against one under disability when the adverse user commenced.² If the disability of the owner of the servient estate is relied upon as a defense, it must be established by the party asserting it. Disability is not presumed; on the contrary, capacity is presumed. Therefore, the person claiming the right is not required to aver and prove that the owner of the servient estate was not under disability.³ It devolves upon the party asserting such disability to establish it by a preponderance of evidence. Freedom from disability is presumed.⁴

But on the other hand it has been held that the burden of proof is on one claiming an easement by prescriptive right, arising from user for the statutory period, to show that during all of such period the servient estate was owned by persons free from legal disability; and where it appears that, during a portion of the time, it was owned by a married woman, no presumption of a grant arises from such user. Accordingly it was regarded as a part of the complainant's case to show affirmatively that during the whole of the prescriptive period the owners of the servient estate were competent to convey a title.⁵

Title by prescription rests upon the presumption of a previous grant or agreement which has been lost. But a grant cannot be presumed against a person who by reason of insanity or other disability was incapable of making it. An easement in the land of an insane person cannot, therefore, be acquired by prescription, until the expiration of such time after his death or the removal of his disability as would bar an action by him or his legal representatives for the land, no matter how long such disability may continue.⁶ A grant by an infant cannot be presumed; and though he has a guardian a grant by the guardian of an easement in his ward's land, extending beyond the limit of the guardianship, is not to be pre-

¹ *Melvin v. Locks & Canals*, 5 Met. 15, 32, 38 Am. Dec. 384.

² *Melvin v. Whiting*, 13 Pick. 184, 188; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156.

³ *Fankboner v. Corder*, 127 Ind. 164, 26 N. E. Rep. 766; *Palmer v. Wright*,

58 Ind. 486; *Davidson v. Nicholson*, 59 Ind. 411; *Reimer v. Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744.

⁴ *Palmer v. Wright*, 58 Ind. 486.

⁵ *Saunders v. Simpson* (Tenn.), 37 S. W. Rep. 195.

⁶ *Edson v. Munsell*, 10 Allen, 557.

sumed, because a guardian is not authorized to grant such an incorporeal hereditament out of the land of the ward.¹

199. After the term of prescription has commenced to run, no intervening disability of the owner of the servient estate will defeat the ordinary limitation arising from twenty years' adverse possession or defeat the presumption of title arising from such enjoyment.² If the disability intervenes after the easement by adverse use and enjoyment has commenced, the time during which such disability continues is not deducted in the computation of the time necessary to give a right by prescription.³ Thus if the owner of the servient estate dies after the adverse use and enjoyment of the right has commenced and the land descends to an infant heir, the easement may be perfected by a continuance of the adverse use after such descent, so that the period of such use during the life of the ancestor and that after the infant heir has acquired title together make up the prescribed period of limitation. "If it were otherwise, it would be difficult to maintain the presumption of a grant by any lapse of time and continuance of possession, if death should intervene in every period of twenty years, so that a man and his ancestors might have the interrupted use and enjoyment of a privilege or easement for a century, without acquiring any right; which cannot be maintained."⁴

An adverse use of a right of way or other incorporeal right having once commenced will not be interrupted by the descent of the servient estate to an infant, or by the subsequent insanity or other disability of the owner of such estate.⁵

A second disability added to that existing during the existence of that operating when the adverse use commenced is to be disregarded. Thus a coverture taking place during infancy is not to be considered after the infancy has ended.⁶

¹ *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156.

² *Wallace v. Fletcher*, 30 N. H. 434; *Allis v. Moore*, 2 Allen, 306; *Currier v. Gale*, 3 Allen, 328; *Edson v. Munsell*, 10 Allen, 557; *Ballard v. Demmon*, 156 Mass. 449, 31 N. E. Rep. 635; *Doyle v. Wade*, 23 Fla. 90; *Reimer v. Stuber*, 20 Pa. St. 458, 463, 59 Am. Dec. 744; *Mebane v. Patrick*, 1 Jones, 23; *Tracy v. Atherton*, 36 Vt. 503.

³ *Melvin v. Whiting*, 13 Pick. 184.

⁴ *Melvin v. Whiting*, 13 Pick. 184, 188, per Wilde, J.

⁵ *Tracy v. Atherton*, 36 Vt. 503; *McFarland v. Stone*, 17 Vt. 165, 174, 44 Am. Dec. 325; *Allis v. Moore*, 2 Allen, 306; *Currier v. Gale*, 3 Allen, 328; *Edson v. Munsell*, 10 Allen, 557; *Ballard v. Demmon*, 156 Mass. 449, 31 N. E. Rep. 635; *Mebane v. Patrick*, 1 Jones, 23. There is some conflict of cases.

⁶ *Reimer v. Stuber*, 20 Pa. St. 458 59 Am. Dec. 744.

V. *Extent of Right Acquired.*

200. A right acquired by prescription is limited to the extent of the use and enjoyment of it during the period of prescription.¹ One who has acquired by prescription the right to maintain a vault or cellar under another's land has no right to interfere with the surface over the vault or to disturb the owner in the use of the soil above.² A right of way for one purpose acquired by user cannot be used for another purpose if the use for the latter purpose would add materially to the burden of the servient estate.³

One claiming by deed a grant of the use of a definite supply of water cannot claim by prescription the right to use water in excess of that amount. A right can be acquired by prescription only where a grant can be presumed. Mr. Justice Lacy, delivering the judgment of the Court of Appeals of Virginia, said:⁴ "If this alleged user had been inconsistent with an existing easement, however acquired, and had been submitted to by the dominant owner for a period of sufficient duration to establish an adverse prescriptive right, the law might presume that the original easement had been released and extinguished, and right to the new and inconsistent easement might be upheld. While inconsistent easements cannot co-exist, one easement of a character inconsistent with another may be created subordinate to the latter, and in that manner the two may co-exist. Thus, if one man has a right to the uninterrupted flow of the water of a stream to his mill, another may have a right to divert the water when it is not required for the mill. But here the easement claimed was asserted and enjoyed under the grant, and a greater flow of water than that flow which was granted was in no way inconsistent with the granted flow."

201. The easement is limited to the use made of it for the whole period of prescription. Where one's prescriptive right to the use of a drain is based on his adverse use of the drain, and not his adverse

¹ Ballard v. Dyson, 1 Taunt. 279; Horner v. Stillwell, 35 N. J. L. 307; Atwater v. Bodfish, 11 Gray, 150; Richardson v. Pond, 15 Gray, 387; Cowell v. Thayer, 5 Met. 253, 38 Am. Dec. 400; Ray v. Fletcher, 12 Cush. 200, Boynton v. Longley, 19 Nev. 69, 6 Pac. Rep. 437.

² Koenigs v. Jung, 73 Wis. 178, 40 N. W. Rep. 801.

³ § 291: American Bank Note Co. v. New York El. R. Co., 129 N. Y. 252, 41 N. Y. St. Rep. 531, 29 N. E. Rep. 302.

⁴ Stearns v. Richmond Paper M. Co., 86 Va. 1034, 1043, 11 S. E. Rep. 1057, per Lacy, J.

right to maintain it, his easement therein must be limited to a use of the kind which has been made for twenty years.¹

The use during this period is the only indication of the nature and extent of the right acquired. It is for the claimant of the prescriptive right to establish the extent of it. Nothing is presumed in his favor and he can claim nothing beyond what the user proves.²

An easement to empty a drain upon the land of another having been enjoyed for a period less than that necessary to obtain title by prescription, the drain was then deepened and enlarged and varied in its course. It was held that such a change interrupted the use and prevented an acquisition of an easement in less than the required time after such change.³

The prescriptive right of a railroad company to maintain an embankment at a certain height is no authority for maintaining it at an increased height, until the full term necessary to create a prescriptive right has run from the time it commenced maintaining the embankment at that height.⁴

Where an elevated railroad built according to its charter upon supporting columns placed along the curbstone line of the street, and was operated by a cable, but after a few years was reconstructed, the supporting columns removed from the original line to a line sixteen inches within the sidewalk, and the road was operated by trains drawn by steam engines, it was held that these changes were material and substantial, and that the rights claimed thereafter were not identical with the original user; that the fact that some undefined and non-separable part of plaintiff's rights in the street, taken originally, were also taken by the changed structure did not give title to that part, although continuously used for twenty years; that having been so used as an integral element of two different users, it must share the fate of such users, and as neither was continuous for the period required, no prescriptive right had been acquired.⁵

202. A greater or more burdensome use of an easement during a part of the prescriptive period does not destroy the character of

¹ *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. Rep. 197. And also *Osten v. Jerome*, 93 Mich. 196, 53 N. W. Rep. 7.

² *New Windsor v. Stowell*, 27 Ch. D. 665, 672; *Williams v. James*, L. R. 2 C. P. 577, 581; *Turner v. Hart*, 71 Mich. 128, 38 N. W. Rep. 890, 15 Am. St. Rep. 243.

³ *Cotton v. Pocasset Manuf. Co.*, 13 Met. 429.

⁴ *Ohio & M. Ry. Co. v. Elliott*, 34 Ill. App. 589.

⁵ *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252, 29 N. E. Rep. 302.

such use as was continuous. Thus the fact that a person who used a drain adversely for one kind of drainage for twenty years, during part of such time used it for another kind of drainage also, does not affect his prescriptive right to its use for the former purpose, such use having been continuous for the whole period.¹

Where one has raised the water of a stream by a dam so that his neighbor's land is overflowed, and he maintains the dam and overflows the land for a period sufficient to give him title by the statute of limitations, the fact that he has strengthened or raised his dam, adversely maintained, during the limitation period, does not affect his right to flood his neighbor's land to the extent established at the beginning of such period. Neither does the occasional letting out of the dammed water by the outlet destroy the continuity of the user of the dam, as against one whose land is flooded thereby.²

The running of the statute of limitations in favor of one using a drain through the land of another is not interrupted by the laying of an earthen drain inside a former wooden one.³

203. There can be no prescriptive easement so large as to preclude the ordinary uses of the land by the owner. No one can be considered, for instance, to have a right of property worth holding in land over which the whole world has the privilege to walk and to deposit itself at pleasure. It would seem that a claim in the nature of an easement incapable of judicial control and restriction cannot be sustained by prescription. It does not follow that rights are sustainable by prescription because they are sustainable by grant. The inhabitants of New Aberdeen, Old Aberdeen and all the neighborhood claimed the right by immemorial use to go upon the defendant's land upon the bank of the river Don for the purpose of recreation, taking air and exercise and resting thereon as they saw proper. The Lord Chancellor, Lord St. Leonards, said: "When you look at the number of persons, some hundreds of thousands perhaps, for whom this right is claimed, with their families and dependents, it is in effect a demand on the part of the public at large to resort to this spot for recreation, exercise, strolling and lying down particularly; for when they walk or get tired, they claim a right of reposing themselves on the surface of the soil." It was

¹ *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. Rep. 197.

³ *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. Rep. 197

² *Alcorn v. Sadler*, 71 Miss. 634, 14 So. Rep. 444, 42 Am. St. Rep. 484.

held that the nature of the easement was incapable of judicial control and restriction and could not be sustained by prescription.¹

In a case before the House of Lords, early in the present century, the question was whether a landowner could keep rabbits in a field in which the inhabitants of the city of St. Andrew, Scotland, claimed the right of playing golf by immemorial custom. Lord Eldon remarked that the case was one of great importance; "for if it was understood to be such as the pursuers contended it was, it went almost to the destruction of the whole of the defender's property. On the other hand, this game of golf was an useful exercise, and appeared to be a very favorite pastime in North Britain. He had hardly ever known a cause in which a warmer interest appeared to be taken. The corporation, the professors, the students, inhabitants of St. Andrews, etc., appeared to be as much alarmed at this increase of rabbits, as, according to Pliny, the people of the Balears were when they sent to Augustus for a military force to suppress them." Lord Eldon further said, that he was as friendly to the game of golf as any one. "But the question was whether a servitude could be supported which subverted the use of the property over which it was claimed?" On a subsequent day, he observed: "certainly it was a different question whether such a title could be set up by prescription, and whether it might be observed by bargain." In conclusion, he further said: "It was a strong thing to say that all who chose to do so might play at golf on a man's ground, and, for that purpose, destroy all the produce which it was best calculated to yield, and prevent its being used for those ends to which alone it could be applied beneficially for the owner."²

¹ Dyce v. Hay, 1 Macq. 305, 310.

² Dempster v. Cleghorn, 2 Dow. 40, 49, 62, 64.

PART II.
SPECIFIC EASEMENTS.

CHAPTER

- V. WAYS BY GRANT.
- VI. WAYS BY IMPLIED GRANT.
- VII. WAYS BY PRESCRIPTION.
- VIII. WAYS OF NECESSITY.
- IX. LOCATION OF WAYS.
- X. LIMITATION OF WAYS.
- XI. OBSTRUCTION OF WAYS.
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PART II.

SPECIFIC EASEMENTS.

CHAPTER V.

WAYS BY GRANT.

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I. *Whether of Fee or only of an Easement.*

204. In general.—A private way is “the right of going over another man’s ground.”¹ When it is an easement it is a right which one has, as appurtenant to his land, to go to and from such land over the land of another by a defined route. It may be a foot-way, or a carriage-way, or both, or a way for cattle only. It may be a way for all purposes, or it may be limited to a single purpose. A mere personal privilege to go over the land of another is not an easement, but a way in gross. Such a way can be used only by the person to whom the privilege is given. It is neither assignable nor inheritable. It attaches to the person to whom it is granted, and it dies when the person dies.² A way which is appurtenant to land passes with the land when that it transferred, whether by deed, by will, or by descent. It is appurtenant to every part of the land to which it is attached, and the person to whom a transfer of any portion of it is made, is entitled to use the way as appurtenant to such portion.

An easement of way is created by express grant or reservation, by an implied grant, or by prescription. It cannot be created by a

¹ Black. Com.; *Boyd v. Woolwine*
40 W. Va. 282, 21 S. E. Rep. 1020.

² See §§ 18-32.

parol license. There may, however, be a parol dedication of a way so that it will become appurtenant to the adjoining land, and will pass to subsequent purchasers and will not be defeated by the Statute of Frauds.¹ A right of way is an interest in the land, and can only be created by grant, or by prescription which implies a grant. A verbal contract is void.²

The easement belongs to that class of rights which is said to lie in grant, and not in livery. It is merely a privilege which one man has in the land of another, and exists only in contemplation of law, and therefore cannot be transferred by livery of possession. There can be no seisin of such a right. The rule, therefore, that one who is disseised of real estate can convey no title thereto, except as against himself, has no application to a conveyance of such an incorporeal hereditament as a right of way.³

205. Parol evidence is not admissible to prove a grant or reservation of a way which is not mentioned in the deed.⁴ Such evidence is not admissible to alter or vary the terms of the deed; it is not admissible to abate or extend the terms of the deed. On the other hand, when the right of way is plainly conveyed or accepted by the terms of the deed, it is not competent to prove by parol, that it was not the intention of the parties that it should be conveyed or accepted.⁵

An entry upon and a continued occupation of land, with the use of a way as appurtenant thereto, under a warranty deed which purports to convey the land and the right of way, are some evidence of title to the land, and of a right to use the way, against one who shows no right to interfere with this use.⁶

206. There may be an easement by grant without an express grant. Whether a right of way or other easement is embraced in a deed depends upon the construction to be given to it, when the grant is not in express words; but to ascertain the intention of the parties, reference may be had not only to the terms of the deed, but to the circumstances attending the transaction, the situation of

¹ Rhea v. Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441.

² Long v. Mayberry, 96 Tenn. 378, 36 S. W. Rep. 1040; Ferrell v. Ferrell, 1 Bax. 329; Nunnally v. Southern Iron Co., 94 Tenn. 397, 413, 29 S. W. Rep. 361; Cole v. Hadley, 162 Mass. 579, 39

N. E. Rep. 279; Morse v. Copeland, 2 Gray, 302.

³ Randall v. Chase, 133 Mass. 210.

⁴ Collam v. Hocker, 1 Rawle, 108.

⁵ Shepherd v. Watson, 1 Watts, 35.

⁶ Shapine v. Shaw, 150 Mass. 262, 22 N. E. Rep. 894.

the parties and the condition of the property. The question is then whether an easement is implied from the terms of the grant as interpreted in connection with all these incidents.¹

Under a deed granting a private right of way clearly defined, no act is required of the grantee to show an express acceptance of it by him. The acceptance of the deed is an acceptance of the way, as nothing remains for either party to do to locate the way.²

Where one grants land for a county road, a reservation of the right "to attach a fence to the bridge" to be built thereon, does not include a right to a passage-way for stock under the bridge.³

207. Whether a deed conveying a way or road passes the fee to the land or only an easement in it, depends chiefly upon the terms of the conveyance. If the deed does not in terms convey the land or soil covered by the way, or include such land within the boundaries of the land conveyed, but merely grants a way in connection with the land conveyed, the grantee takes no interest or estate in the soil of such way.⁴

A conveyance of the free use of the undivided half-part of a wagon-way, described to be used only for passing in and out at all proper times, but without unnecessary delay or obstruction to the passage-way, thereby causing annoyance and damage to the grantor his heirs or assigns, with an *habendum* to the grantee, his heirs and assigns, and the usual covenants of warranty, conveys only a right of way or easement. The restrictions as to the use of the way make it obvious that the conveyance was not in fee, for in that case the grantee could use the way as he pleased.⁵

A conveyance by each of two adjoining owners to the other of the space between his building and the common boundary, to be used as a common passage-way for their mutual benefit, and for no other purpose but a passage-way, divests each grantor of his title to the land conveyed, so as to preclude him from maintaining trespass for an obstruction of such passage-way.⁶

A conveyance by one of two owners of adjoining farms to the

¹ In Matter of One Hundred and Sixteenth Street, 73 N. Y. St. Rep. 100, 37 N. Y. Supp. 508; Winston v. Johnson, 42 Minn. 398, 45 N. W. Rep. 958; Mitchell v. Prepont (Vt.), 35 Atl. Rep. 496.

² Smith v. Worn, 93 Cal. 206, 28 Pac. Rep. 944.

³ Agne v. Seitsinger (Iowa), 60 N. W. Rep. 483.

⁴ Home v. Richards, 4 Call (Va.), 441.

⁵ Harris v. Johnson, 31 N. J. Eq. 174.

⁶ Low v. Streeter, 66 N. H. 36, 20 Atl. Rep. 247, 9 L. R. A. 271

other, of a strip of land twenty-four feet wide across his farm for a private road to a highway, with a covenant by the grantee securing to the grantor, his heirs and assigns the right to travel upon said road, is a conveyance of the strip of land in fee. The covenant is consistent with the assumption that the grantee became the owner of the land, reserving to the grantor merely the right to travel over it.¹

208. A grant in terms of "a way," or of "the privilege of a highway," does not convey the soil or any corporeal interest in it.² The grantee of such right cannot prevent even a trespasser from using the land, if he does not impede the exercise of such right of way.³ A right of way is an easement merely which does not conflict with the absolute proprietorship of the owner.⁴

A deed conveying "a road and right of way over and across" land, "to be forever appurtenant to" adjoining land of the grantee, and providing that neither party shall, "nor shall his successors in interest grant or give to any other person a right of way over said road," conveys only an easement for a right of way, and not a fee simple title. If the deed was intended to grant a title in fee simple, there was no occasion for providing that the road and right of way were to be forever appurtenant to the land of the grantee. Obviously, too, if the grantor had no title left in him, there was no occasion to provide that he should not grant a right of way to any other person; and if the grantee had a complete title he could grant a right of way over the road notwithstanding the provision that he should not. It is clear that the object was to grant a right of way and nothing more.⁵

The owner of a parcel of land at the end of a court conveyed to the owners of the estates abutting on the court "the use of said parcel for light, air, and as an ornament to said court; said parcel to be forever kept open and used as a garden, or for the purpose of extending said court;" retaining himself the right in the soil of said parcel. He afterwards conveyed the parcel to the owner of an adjoining estate. This language was held not to import a right in the grantees, owning the abutting land, to use this parcel of land as a

¹ Kilmer v. Wilson, 49 Barb. 86; Long Island R. Co. v. Conklin, 32 Barb. 381, 388.

² Low v. Streeter, 66 N. H. 36, 20 Atl. Rep. 247; Jamaica Pond Aqueduct Co. v. Chandler 9, Allen, 159.

³ Grafton v. Moir, 130 N. Y. 465, 470, 29 N. E. Rep. 974.

⁴ Snyder v. Warford, 11 Mo. 513, 49 Am. Dec. 94.

⁵ Peterson v. Machado (Cal.), 43 Pac. Rep. 611.

garden or to extend the court. "All they acquired was a right to light and air, and the view of the grounds. The covenant to keep it open, and use it in the way stated, was a covenant of the grantor, and as it was for him to do the acts prescribed, if he performed the duty either of using it for a garden or for extending the court, his covenant was performed." The grantor having the fee of the land after the conveyance of the easement had the right of passing over this parcel to the court; and this right passed to his grantee of the fee of the land.¹

209. A reservation or exception of the use of an alley is a reservation of an easement only.² Thus a devise of a house with the appurtenances, the second story being built over an alley, under which the cellar extends to the foundation walls of the adjoining house, passes the fee of the alley to the devisee.³

A reservation of a portion of the land described in a deed to be used as an alley operates as a conveyance of the fee of the portion reserved, subject only to the easement declared.⁴

A conveyance of a farm "reserving to the public the use of the road through said farm, also reserving to the White Mountains Railroad the roadway of said road, and also reserving to myself the damages appraised for said railroad way," is a conveyance of the land subject only to the easements named and the unpaid damages, and there is no reservation of the soil or fee of the public road or of the railroad.⁵

210. A conveyance of a strip of land in explicit terms with a restriction that it shall be used only for a road passes the land in fee, and not a mere easement in it.⁶ A grant of "those sea grounds, oyster layings, shores and fisheries," is a grant of the land in fee and not of a mere easement.⁷ A grant of an acre of land for a burial place is a grant of the soil and not of a mere easement.⁸

¹ Gardner v. Boston, 106 Mass. 549, 552.

² Winston v. Johnson, 42 Minn. 398, 45 N. W. Rep. 958.

³ Cheetham v. Muhlenberg, 133 Pa. St. 309, 19 Atl. Rep. 547.

⁴ Morrison v. First Nat. Bank, 88 Me. 155, 33 Atl. Rep. 782; Towne v. Salentine, 92 Wis. 404, 66 N. W. Rep. 395;

King. v. Murphy, 140 Mass. 254, 4 N. E. Rep. 566.

⁵ Richardson v. Palmer, 38 N. H. 212. And see Day v. Philbrook, 85 Me. 90; Wellman v. Dickey, 78 Me. 29, 2 Atl. Rep. 133.

⁶ Coburn v. Coxeter, 51 N. H. 158.

⁷ Scrutton v. Brown, 4 Barn. & C. 485.

⁸ Chatham v. Brainerd, 11 Conn. 60, 90.

A grant of a tract of land by metes and bounds, except a strip on the westerly side, further described as a passage-way, "reserved by me to be used as such, and to be used by the grantee and his assigns as a passage-way in common with myself and others under me," is a grant of a right of way only and not of the soil of the passage-way.¹

A deed providing that the grantor shall open as a private way a specifically described strip of land across other land belonging to him to land conveyed to the grantee, "to be used as a private alley," so long as the grantee shall require it, and reserving title to the strip in the grantor, conveys an easement of a private way.²

A deed to one, "his heirs and assigns, for the sole purpose of an alleyway, to be used in common with the owners of other property adjoining said alleyway," conveys only an easement, and dedicates the land for use as an alleyway.³

211. A grant of a right of way to a railroad company is the grant of an easement merely, and the fee remains in the grantor.⁴ It does not follow that because a railroad company may take an estate in fee, that it does in fact take such an estate; for the parties by their contract may create a less estate than that which the law authorizes the company to take.⁵

A railroad or canal company taking land under the right of eminent domain for the purpose of constructing a public highway, acquires only an easement in the land, and not a title in fee. The purpose of the statute giving the power to acquire a right of way, is to enable the corporation to acquire what is necessary for the construction of the highway, and nothing more. The title to the land taken remains, in such case, in the owner, subject only to such servitude as the corporation had power to impose, and this is, as a general rule, only the use of the land for a right of way.⁶

¹ Stearns v. Mullen, 4 Gray, 151.

² Shannon v. Timm, 22 Colo. 167, 43 Pac. Rep. 1021.

³ Pellissier v. Corker, 103 Cal. 516, 37 Pac. Rep. 465.

⁴ Cincinnati, I. St. L. & C. Ry. Co. v. Geisel, 119 Ind. 77, 21 N. W. Rep. 470; Jones v. Van Bochove, 103 Mich. 98, 61 N. E. Rep. 342; Fitchburg R. Co. v. Frost, 147 Mass. 118, 121, 16 N. E. Rep. 773; Flaten v. Moorhead, 51 Minn. 518, 53 N. W. Rep. 807, where the con-

veyance was to a city, of land, to be "used as a public park." Robinson v. Missisquoi R. Co., 59 Vt. 426, 10 Atl. Rep. 522; Williams v. Western Union R. Co., 50 Wis. 71, 76, 5 N. W. Rep. 482.

⁵ Cincinnati, I. & St. L. & C. R. Co. v. Geisel, 119 Ind. 77, 21 N. E. Rep. 470.

⁶ New Jersey Zinc & I. Co. v. Morris Canal & B. Co., 44 N. J. Eq. 398, 15 Atl. Rep. 227; Taylor v. New York & Long Branch R. Co., 38 N. J. L. 28.

212. Where the granting clause of a deed declares the purpose of the grant to be a right way for a railroad, the deed passes an easement only, and not a fee, though it be in the usual form of a full warranty deed.¹ “Where the land is first conveyed, and then a provision afterwards inserted, showing what the land is to be used for, it is held in many cases that the fee is conveyed, and the clause providing for what the land is to be used is a condition subsequent; but this deed is not open to that construction. It is clear that an easement only was here intended.”²

And so a conveyance by a landowner of the bed of a canal, for the purpose of securing a right of way for the construction of a ship canal, is deemed to be the conveyance of an easement merely and not of the fee.³

A deed of a right of way for a railroad, *habendum* “so long as the same shall be used for the operation of a railroad,” provided it should be built by a certain date, gives an easement merely, and not a fee, and the agreement to build the road is a condition subsequent, and not a mere covenant; and therefore an action for a forfeiture for breach of the condition is not limited to the grantors or their heirs, but extends to their grantees and assigns.⁴

And so if land be condemned under statutory authority for the right of way of a railroad, the fee remains in the owner, and the railroad company acquires only an easement.⁵ By virtue of the right of eminent domain the company can only acquire such rights or interests as are reasonably necessary for its use in the discharge of its duties to the public; and it can rightfully use the rights only for a public use. If it changes the use to private purposes or to a private business, such change will not put an end to the right of use for the purpose of the franchise, but the owner of the fee may recover the rental value of the land during the time of such wrongful use.⁶

The acquisition by a railroad or canal company of an easement of

¹ Jones v. Van Bochove, 103 Mich. 98, 61 N. W. Rep. 342; Biles v. Tacoma, O. & G. H. R. Co., 5 Wash. 509, 32 Pac. Rep. 211. Line Ry. Co., 10 Wash. 357, 38 Pac. Rep. 1126.

² Jones v. Van Bochove, 103 Mich. 98, 61 N. W. Rep. 342. ⁵ Lyon v. McDonald, 78 Tex. 71, 9 L. R. A. 295, 14 S. W. Rep. 261; O'Neal v. Sherman, 77 Tex. 182, 14 S. W. Rep. 31.

³ Nichols v. New England Furniture Co., 100 Mich. 230, 59 N. W. Rep. 155. ⁶ Proprietors of Locks & Canals v. Nashua & L. R. Co., 104 Mass. 1, 86 Am. Rep. 181; Lyon v. McDonald, 78 Tex. 71, 9 L. R. A. 295.

⁴ Reichenbach v. Washington Short

a right of way over the land of a riparian owner, along or on the shore of his land, does not, according to the general principles of law, deprive such owner of his right or equity to preserve or improve the connection of his land with the adjacent tide-water.¹

But although a railroad company be restricted to an easement in land acquired for its right of way, if land be conveyed to it by a deed adapted to convey a fee for a special purpose, as, for instance, for a station, the estate granted is in fee.²

213. In a deed to a railroad company of a right of way, a reservation of an existing cartway over it is an exception of the cartway from the grant, and does not create a new right in the grantor by way of reservation; and hence the word "heirs" is not necessary to make the easement of crossing perpetual. A perpetual provision in the deed, that the railway company shall construct and maintain the crossing, with the necessary cattle-guards, does not show that a new right, by way of reservation, was created in the grantor, which could be exercised only after something had been done by the grantee; nor does it bar the construction that the right of passage remained in the grantor, by way of exception, as of his former estate.³

And so where one conveyed a right of way for a railroad, "reserving the pass-way at grade over said railroad where now made," and it appeared that the railroad company had already taken land for its location, it was held that the right of way was by exception and not by reservation, and that a perpetual easement was created in the grantor, although the word "heirs" was not used.⁴

¹ New Jersey Zinc & I. Co. v. Morris Canal & B. Co., 44 N. J. Eq. 398, 15 Atl. Rep. 227.

² Fitzgerald v. Faunce, 46 N. J. L. 536, 597.

³ Hamlin v. New York & N. E. R. Co., 160 Mass. 459, 36 N. E. Rep. 200. And see Eames v. Worcester & N. R. Co., 105 Mass. 193.

⁴ White v. New York & N. E. R. Co., 156 Mass. 181, 30 N. E. Rep. 612. In Hamlin v. New York & N. E. R. Co., the court, referring also to the case last cited, said: "In neither that case nor the present did the deed contain a declaration of the parties as to whether the nature of the right was to be in fee

or for life. In both instances, the right of crossing was clearly intended to be annexed as an easement to the grantors' remaining lands for their benefit; the parties were dealing with existing ways, which had been in use before the filing of the location, and the right of crossing was not only necessary for present use, but the circumstances were such as to make it evident that the necessity would be permanent. In each instance, also, the grantors' claim for damages was released by deed, no petition for damages or for a private crossing was made, and the parties evidently undertook to settle the whole matter by the deed. All these circum-

But where a grant was made to a railroad company before it had taken the land for its location, and there was no evidence of an existing way across the land granted, it was held that the passage-way reserved to the grantor alone over the road must be taken to have been acquired by way of reservation and not by way of exception, and was a life estate only.¹

In a proceeding by a city against a railroad company to condemn a strip of land across its right of way and tracks, for the extension of a public street, the judgment of condemnation, no matter what its language may be, will not take the land itself or the exclusive use of it, but will confer only a mere easement to pass over the right of way and tracks of the railroad.²

214. Where a deed, conveying land in fee to a railroad company for its track, provides that the company shall establish a crossing to enable the grantor to pass from one parcel of his land to another, the fee of the crossing remains in the company, subject only to the right of passage from one parcel to the other. Therefore, if a pipe line company, having purchased of the same grantor a parcel of land on either side of this crossing, so as to obtain access to the crossing, proceeds to dig trenches in such crossing and to lay a pipe for the purpose of conducting oil through the land conveyed to the railroad company, beneath the surface of such crossing, it becomes a trespasser, and the railroad company may remove such pipe. The crossing provided for was nothing more than a right of way over the surface of the soil from one parcel of the grantor's land to another. No other or greater right was provided for, reserved or excepted. Even if the deed to the railroad company, in such case, declares that the grant is made for the purpose of constructing

stances make it clear that the parties intended that the right of crossing should be perpetual, and, unless there is some feature of the contract between them which forbids us to construe their language as an exception, it should be so construed, and their intention carried out. The test is whether the language used retained in the owners of the farm a right of crossing not dependent upon any act to be performed by the railroad company, or created a new right which could be exercised only after something had been

done by the grantee, which the contract stipulated that it should do, and which it was not otherwise bound to do, and the performance of which was essential to the exercise of the easement." Per Barker, J.

¹ *Claffin v. Boston & A. R. Co.*, 157 Mass. 489, 32 N. E. Rep. 659; *Ashcroft v. Eastern R. Co.*, 126 Mass. 196, 30 Am. Rep. 672.

² *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586, 30 N. E. Rep. 1044; *Harris v. Chicago*, 162 Ill. 288, 44 N. E. Rep. 437.

and operating its road over it, such restriction is no limitation upon its rights as owner of the fee as against all the world. The estate in fee is merely limited to this use.¹

215. A reservation by a grantor of a right of way over the land conveyed strictly gives him a life interest only, unless the reservation is to himself and his heirs, or the reservation is made appurtenant to particular land belonging to him.²

A reservation by the grantor to himself and his "representatives forever" of the right of passage over the land conveyed is not equivalent to a reservation to himself and "heirs," and only a life easement is thereby reserved.³

A reservation may, however, have the force of an exception, when it does not create a new right out of the thing granted, and it appears to have been the intention of the parties that the word used should operate by way of withholding from the grant some part of the subject-matter which would otherwise pass by the general description of the thing granted.⁴ The owner of land fronting on a river conveyed a strip across the same to a railroad company, reserving the right to cross such strip at any place. The way at the date of the deed was an existing one, plainly visible and necessary, and in almost constant use. The right to continue to use it was an almost absolute necessity, not only to the grantors, but to all subsequent owners of the premises. It was held, that such reservation created a permanent easement in favor of the unconveyed portion, not limited to the life of the original owner, but passed with a conveyance of the premises. "If, in construing the 'reservation' in question, we lay out of view the technical rule above mentioned, it is difficult to believe that the parties to the deed intended that the right to cross was only to exist during the life of the grantors. The

¹ Breckinridge v. Delaware, L. & W. Mass. 489, 32 N. E. Rep. 659; Curtis R. Co. (N. J. Eq.), 33 Atl. Rep. 800; State v. Brown, 27 N. J. L. 13.

² §§ 89-103; Jones on Real Property, § 548; White v. New York & N. E. R. Co., 156 Mass. 181, 30 N. E. Rep. 612; Bean v. French, 140 Mass. 229, 3 N. E. Rep. 206; Clafin v. Boston & A. R. Co., 157 Mass. 489, 32 N. E. Rep. 659; Ashcroft v. Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672; Karmuller v. Krotz, 18 Iowa, 352.

³ Clafin v. Boston & A. R. Co., 157

Mass. 489, 32 N. E. Rep. 659; v. Gardner, 13 Met. 457.
⁴ §§ 92-94; Jones on Real Property, § 505; Clafin v. Boston & A. R. Co., 157 Mass. 489, 32 N. E. Rep. 659; Bowen v. Conner, 6 Cush. 132; White v. Crawford, 10 Mass. 183; Dennis v. Wilson, 107 Mass. 591; Winthrop v. Fairbanks, 41 Me. 307; Smith v. Ladd, 41 Me. 314; Lathrop v. Elsner, 93 Mich. 599, 53 N. W. Rep. 791; Karmuller v. Krotz, 18 Iowa, 352.

situation and needs of the grantor's premises seem to forbid such a belief." ¹ The reservation of an existing right may therefore be construed as an exception. ² But a reservation cannot be construed as an exception when the intention was to confer upon the grantor a new right, not previously vested in him. ³

Accordingly where the owner of a tract of land conveyed a part of it by a warranty deed, reserving, however, the privilege of a bridle path in front of the house, the right was construed to be a reservation and not an exception, on the ground that the effect of the clause was to create a right not previously existing. The right which the grantor had to pass and repass over any part of his estate, while he owned the whole of it, was held not to be an existing right of way over the part which he conveyed. ⁴

216. A right of passage may exist between the surface of the soil and underground strata. ⁵ Where the mineral estate is severed from the surface by a conveyance, the lower estate is subject to the servitude imposed upon it by nature, for the support of the surface, and the surface owes to the lower estate, a servitude of access. ⁶

217. A right of passage may exist between different portions of the same building, whether these portions be upon the same level, or be upper and lower stories. When such right exists in favor of an upper story of a building, there is of necessity attached thereto an easement of support, as well as a right of access from the lower stories. ⁷ A reservation by the owner of a building comprising two stories, in a deed conveying one of them, of the right to use the front stairs and the hall on the second floor in common with the owners of the part conveyed, creates an easement appurtenant to the part retained by the grantor, the benefit of which passes to subsequent purchasers. ⁸

218. Mutual covenants by owners of adjoining lots for the joint use of the stairs, hallways, and skylights in buildings upon their

¹ Chappel v. New York, N. H. & H. R. Co., 62 Conn. 195, 203, 24 Atl. Rep. 997; and see Myers v. Dunn, 49 Conn. 71; Jones on Real Property, § 550.

² Jones on Real Property, § 506; Claffin v. Boston & A. R. Co., 157 Mass. 489, 32 N. E. Rep. 659.

³ Jones on Real Property, § 508.

⁴ Bean v. French, 140 Mass. 229, 3 N. E. Rep. 206.

⁵ Newhoff v. Mayo, 48 N. J. Eq. 619, 23 Atl. Rep. 265.

⁶ See chapter XV; Robertson v. Coal Co., 172 Pa. St. 566, 33 Atl. Rep. 706.

⁷ § 263; Newhoff v. Mayo, 43 N. J. Eq. 619, 23 Atl. Rep. 265.

⁸ Walz v. Walz, 101 Mich. 167, 59 N. W. Rep. 431.

several lots, are in effect a grant to each of an easement in so much of the stairs, halls and sky-lights as may be situated upon the lot of the other. Such easements are in no way inconsistent with the several ownership of the two buildings. They afford no ground for partition because each owns his easement in severalty. Such easement is real property, an incorporeal hereditament, and as much a part of the owner's estate as the building itself. The owner of the adjoining building, subject to such easement, may be enjoined in equity from tearing down or destroying his building during the existence of such easement: and if he suffers his building to go to decay, the other owner having such easement may enter for the purpose of repairing, in order to preserve his easement.¹

219. One may have a right to use stairs upon the adjoining land of another by virtue of an executed license in the nature of an easement. Thus where the owners of adjoining lots built a single building covering both lots, and the only access to the upper stories was by stairs which were altogether on one lot, it was held that the erection of the building constituted an executed license, in the nature of an easement, on the part of the owner of such lot. "A right of this character, while not strictly an easement, is in the nature of one. It is really a permission or license, express or implied, to use the property of another in a particular manner, or for a particular purpose. Where this permission has led the party to whom it has been given to treat his own property in a way in which he would not otherwise have treated it, as by the erection or construction of permanent improvements thereon, it cannot be recalled to his detriment. Having expended his money upon the faith of it, and not being able to be restored to his original position, equity will not allow the permission to be revoked, in breach of such faith. This has given rise to the doctrine of executed or irrevocable licenses."²

220. There is no easement attached to the upper tenement of a house to have gas meters located in a lower tenement of the house. Where a building is constructed with a single service pipe from the street main to the cellar, connecting with separate pipes to conduct the gas into the several stories, there is a servitude upon the lower story and cellar for a gas supply through these pipes. But when the upper stories are leased to one tenant, and the lower story and

¹ Barr v. Lamaster, 48 Neb. 114, 66 N. W. Rep. 1110; Trustees v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615. ² Clelland's Appeal (Pa.), 19 Atl. Rep. 352; see §§ 77, 78.

cellar to another, the latter tenement is not, in the absence of any provision in the leases, subject to the servitude of having the meters for the upper tenement placed therein, or to the further servitude of a right of way for the company supplying the gas to go through such tenement to inspect such gas meter. The gas company is not entitled to an injunction to restrain the lessee of the lower tenement from removing such gas meter. No right to have the gas meter for the upper tenement placed in the lower is implied from necessity, for it is neither impracticable nor unusual to place the gas meter for the upper floors on those floors.¹

221. One cannot grant an easement in land after he has parted with his title to it. Thus, if an abutting owner conveys all his interest in a street, with consent to the grantee to close the street, the latter may close it, as against one thereafter receiving a deed from the grantor of his abutting lots. The owners of land on opposite sides of the same street have the undoubted right, as between themselves, to consent to the closing of the street, and either may convey to the other all interest in the land occupied by the street.²

If one lays out a way through his land with lots on each, and then conveys one of these lots with a right of way over the whole of it, and afterwards conveys another lot with the fee of the street in front of it, and finally conveys a third lot bounding on the same street opposite to the two lots already sold, the purchaser of the last named lot acquires no right of way in that part of the street, because his grantor was then powerless to place an additional burden upon it; and the last purchaser could claim no rights under the deed of the first purchaser, because to that deed he is a stranger.³

222. A conveyance of land bordering upon a way passes no easement in the way, in case the grantor has already conveyed to another in fee the title to the soil of the way. Having no title to the way the grantor can confer no right to use it. Thus, an owner of land having divided it into lots, conveyed several of them with the right to use the land lying to the east of them. Subsequently he conveyed the land lying to the west of the alley together with the soil of the alley in fee, reserving the use of the alley granted to the owners of the lots on the westerly side of it. After

¹ Wilkes-Barre Gas Co. v. Turner, 7 Kulp, 399.

³ Oliver v. Pitman, 98 Mass. 46. And see Dorman v. Bates Manuf. Co., 82 Me. 438, 19 Atl. Rep. 915.

² § 81; Comstock v. Sharp (Mich.), 64 N. W. Rep. 22.

this he conveyed a lot at the head of the alley and to south of it. It was held that this conveyance passed no right to use the alley, but it was left to the jury to say, whether at the time of the conveyance the alley was notoriously used as a way appurtenant to the lot conveyed. The jury found that the way was not so used, so that the owner of the lot had no easement in the alley either by grant or adverse use.¹

223. A right of way has been held appurtenant to land already conveyed by force of a recital in a subsequent deed of other land to another purchaser. Thus where one conveyed a portion of his land, and afterwards laid out an alley, bounding partly on the land conveyed and partly on that retained by the grantor, the grantee and those claiming under him were declared entitled to the use of such alley as against a subsequent grantee of the remainder of the land, by deeds which recite that he is entitled to "the free use and privilege of said alley in common with" the first grantee, "his heirs and assigns, owners, tenants, and occupiers of the other lots of ground bounding thereon."² The recital operated by way of an exception.

Where one conveys a strip through the middle of a farm reserving a right of way across it, and at the same time conveys the rest of the farm by deed describing the whole farm, and then excepting "that portion thereof this day deeded," the grantee in the second deed is entitled to the benefit of the reservation in the first deed, though it is not mentioned in his deed.³

224. One tenant in common cannot, by his sole act, create an easement in the premises held in common. Nor can a tenant in common, who owns other premises in severalty, so use the last as to acquire or exercise for the benefit thereof, an easement in the property held in common; and he cannot, by grant or by operation of an estoppel or otherwise, confer upon another rights and privileges which he does not himself possess. A subsequent grantee of all the tenants in common is not estopped by the fact of his succeeding to the interest of the one who granted the easement from asserting, as a grantee of the co-tenants, the invalidity of the grant of the easement, and as against him it is void.⁴

¹ *McNeal v. Rebman*, 168 Pa. St. 109, 31 Atl. Rep. 1002; also *Regan v. Boston Gas Light Co.*, 137 Mass. 37.

² *Ehret v. Gunn*, 166 Pa. St. 384, 31 Atl. Rep. 200

³ *Wells v. Tolman*, 34 N. Y. Supp. 840. See *Jones R. P.* §§ 528, 529.

⁴ *Crippen v. Morss*, 49 N. Y. 63; followed and approved in *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. Rep.

A right of way can be granted only by the owner in fee of the land; a mere equitable owner of an undivided interest in a possible reversion cannot give it, and it cannot well exist over an undivided interest alone.¹

A lessee cannot grant a right of way over the land of his lessor which will be valid as against the latter. A lessee can confer no right beyond the term of his lease.²

A grantor cannot reserve to himself the right to restrain the invasion of any easement in a street or way belonging to the property conveyed, because such easements are appurtenant to the land, and can only be enforced by the owner of the fee.³

225. The owner of an estate for years may grant a right of passage over the land demised which will have all the qualities of an easement during the remainder of his term, but will cease upon its expiration. "A servitude of that character might be created in favor of any other estate, even though the latter be an estate of freehold, not of inheritance, or an estate less than freehold. That the servient and dominant estates are estates for life or years would not at all affect the qualities of the right so long as it continues, but only its duration. If the dominant estate is a terminable estate, the right of passage would cease when that estate terminated; if the servient estate is an estate of like character, the right of passage would cease when it terminated. Such a right, while it endures, has every characteristic of an easement, and should be governed by the rules relating to such incorporeal hereditaments."⁴ Upon the renewal of a lease under which such a right exists the right will not cease, but will, at least in equity, continue during the renewed term; for the renewed lease is deemed a mere continuance of the original term for the preservation and protection of rights acquired therein.⁵

966, reversing 24 N. Y. Supp. 613; Marshall v. Trumbull, 28 Conn 183, 73 Am. Dec. 667; Collins v. Prentice, 15 Conn. 423, 426; Great Falls Co. v. Worster, 15 N. H. 412, 459.

¹ § 81; Tapert v. Detroit, G. H. & M. R. Co., 50 Mich. 267, 15 N. W. Rep. 450.

² Drda v. Schmidt, 47 Ill. App. 267; Harding v. Hale, 83 Ill. 501; Gentleman v. Soule, 32 Ill. 271, 83 Am. Dec. 264.

³ Foote v. Manhattan R. Co., 58 Hun, 478, 36 N. Y. St. 119, 12 N. Y. Supp. 516.

⁴ Newhoff v. Mayo, 48 N. J. Eq. 619, 623, 23 Atl. Rep. 265, per Magie, J. And see Wheaton v. Maple (1893), 3 Ch. 48, 62, per Lindley, L. J.; Doe v. Pyke, 5 M. & S. 146; Piggott, v. Shatton, 1 De G. F. J. 33.

⁵ Newhoff v. Mayo, 48 N. J. Eq. 619, 23 Atl. Rep. 265.

226. It is an established rule that a conveyance of land bounded on or by a way, whether public or private, carries the title to the center of the way, if the grantor's title extends so far.¹ If the way is a private way, and the grantee takes the title in fee to the center of the way, and his grantor owns the other half of the way in fee, the grantee, by implication, takes a right of way over such other half of the way subject to a like right in the grantor over the half conveyed.²

This rule applies in case of a partition by order of court, of real estate held in common, where a way is laid out through the estate "to be held in common and undivided by the parties, abutters thereon," and all the lots or parcels set off are bounded on this way. The fee in the soil of such way did not remain in common, but by the partition became parcel of each of the lots set off. The statement that the way was to be held common and undivided was meant to describe the easement in the way and that it was to be enjoyed by the abutters in common, and was not intended to make them owners of the soil in common.³

Where one owning two parcels of land with a passage-way between them, sold one parcel bounding it upon the passage-way, and afterwards sold the other parcel bounding it on the passage-way, "together with my right in common with said passageway," it was held that the first conveyance was a grant of the soil to the middle of the way, with a right of way in the opposite half of the passage, and that the second conveyance was a grant of all the interest in the passage-way remaining in the grantor after the first conveyance, namely, the fee of the adjoining half of the passage and a right of way over the other half. In other words, both grantees were upon terms of equality as to both the soil and the way.⁴

II. *Easement Implied from Boundary by Way.*

227. Where one conveys land bounded upon a private road or way, the fee of which is in the grantor, he impliedly grants an easement of way.⁵ "That an owner of land does acquire an interest in a street abutting on his property, where the conveyance

¹ Jones on Real Property, §§ 448, 449.

² Kelley v. Saltmarsh, 146 Mass. 585, 16 N. E. Rep. 460.

³ Clark v. Parker, 106 Mass. 554; Morgan v. Moore, 3 Gray, 319.

⁴ Winslow v. King, 14 Gray, 321.

And see to like effect Lewis v. Beattie, 105 Mass. 410.

⁵ Roberts v. Karr, 1 Taunt. 495; Harding v. Wilson, 2 B. & C. 96;

of such property to such owner bounds the property by the street, and where the grantor owned the fee of the street, even though the conveyance excludes the fee of the street, separate

Espley v. Wilkes L. R. 7 Ex. 298;
United States v. Appleton, 1 Sumn.
492, Fed. Cas. No. 14463.

California: **Breed v. Cunningham**,
2 Cal. 361.

Illinois: **Zearing v. Raber**, 74 Ill. 409.

Iowa: **Garstang v. Davenport**, 90
Iowa, 359, 57 N. W. Rep. 876.

Kansas: **Riley v. Stein**, 50 Kans. 591,
32 Pac. Rep. 947.

Kentucky: **Rowan v. Portland**, 8 B.
Mon. 232.

Maine: **Bartlett v. Bangor**, 67 Me.
460; **Stetson v. Bangor**, 60 Me. 313;
Sutherland v. Jackson, 32 Me. 80; **Dor-**
man v. Bates, Manuf. Co., 82 Me. 438,
19 Atl. Rep. 915; **Warren v. Blake**, 54
Me. 276, 89 Am. Dec. 748.

Massachusetts: **Cole v. Hadley**, 162
Mass. 579, 39 N. E. Rep. 279; **Tobey**
v. Taunton, 119 Mass. 404; **Howe v.**
Alger, 4 Allen, 206; **Stetson v. Dow**, 16
Gray, 372; **Rodgers v. Parker**, 9 Gray,
445; **Farnsworth v. Taylor**, 9 Gray,
162; **Loring v. Otis**, 7 Gray, 563; **Tufts**
v. Charlestown, 2 Gray, 271; **Gaw v.**
Hughes, 111 Mass. 296; **Lefavour v.**
McNulty, 158 Mass. 413, 33 N. E. Rep.
610; **Goss v. Calhane**, 113 Mass. 423;
Fox v. Union Sugar Refinery, 109 Mass.
292; **O'Linda v. Lothrop**, 21 Pick. 292;
Parker v. Smith, 17 Mass. 413, 9 Am.
Dec. 157; **Emerson v. Wiley**, 10 Pick.
310; **Lewis v. Beattie**, 105 Mass. 410;
Parker v. Framingham, 8 Met. 260, 267,
per Shaw, C. J.; **Franklin Ins. Co. v.**
Cousens, 127 Mass. 258. The early
case of **Clap v. M'Neil**, 4 Mass. 589,
to the contrary not followed since.

Michigan: **Bell v. Todd**, 51 Mich. 21,
16 N. W. Rep. 304; **Smith v. Lock**, 18
Mich. 56; **White v. Smith**, 37 Mich.
291; **McConnell v. Rathbun**, 46 Mich.
303, 9 N. W. Rep. 426; **Horton v. Wil-**
liams, 99 Mich. 423, 58 N. W. Rep. 369.

Minnesota: **Long v. Fewer**, 53 Minn.
156, 54 N. W. Rep. 1071; **Dawson v.**
St. Paul F. & M. Ins. Co., 15 Minn. 136,
2 Am. Rep. 109.

Missouri: **Heitz v. St. Louis**, 110
Mo. 618, 19 S. W. Rep. 735; **Field v.**
Mark, 125 Mo. 502, 28 S. W. Rep. 1004;
Moses v. St. Louis Dock Co., 84 Mo.
242; **Buschmann v. St. Louis**, 121 Mo.
523, 26 S. W. Rep. 687.

Nevada: **Lindsay v. Jones**, 21 Nev.
72, 25 Pac. Rep. 297.

New Jersey: **White v. Tide-Water**
Oil Co., 50 N. J. Eq. 1, 25 Atl. Rep. 199,
(N. J. Eq.) 33 Atl. Rep. 47;
Dodge v. Pennsylvania R. Co., 43 N. J.
Eq. 351, 11 Atl. Rep. 751.

New York: **Lord v. Atkins**, 138 N.
Y. 184, 33 N. E. Rep. 1035; **Cunning-**
ham v. Fitzgerald, 138 N. Y. 165, 33 N.
E. Rep. 840; **Haight v. Littlefield**, 147
N. Y. 338, 41 N. E. Rep. 696, 69 N. Y.
St. Rep. 674; **Hennessy v. Murdock**, 137
N. Y. 317, 33 N. E. Rep. 330; **Nicklas**
v. Keller, 41 N. Y. Supp. 172; **Ranscht**
v. Wright, 41 N. Y. Supp. 108; **Baker**
v. Mott, 78 Hun, 141, 28 N. Y. Supp.
968; **People v. Underhill**, 144 N. Y. 316,
39 N. E. Rep. 333; **Matter of Opening**
Eleventh Avenue, 81 N. Y. 436; **White's**
Bank v. Nichols, 64 N. Y. 65; **Story v.**
Elevated R. Co., 90 N. Y. 122, 163, 43
Am. Rep. 146; **Smyles v. Hastings** 22
N. Y. 217, 24 Barb. 44; **Bissell v. N. Y.**
Cent. R. Co., 23 N. Y. 61; **Wiggins v.**
McCleary, 49 N. Y. 346; **Matter of One**
Hundred and Sixteenth Street, 73 N. Y.
St. 100, 37 N. Y. Supp. 508; **Cox v.**
James, 45 N. Y. 557; **Huttemeier v.**
Albro, 18 N. Y. 48; **Foster v. Buffalo**,
64 How. Pr. 127; **Wyman v. New York**,
11 Wend. 486; **Livingston v. New York**,
8 Wend. 85, 106, 22 Am. Dec. 622;
Child v. Chappell, 9 N. Y. 246, 257;
Holloway v. Delano, 18 N. Y. Supp.

and distinct from the right of the public to use the street as a public road or highway, is clear upon principle, and is settled by authority, and such right arises from the implied covenant in the deed, when it conveys the property bounding it by the street, that there is a street, and that, so far as the property of the owner of the fee in the street is concerned, such parts of the street as abut on the property conveyed shall remain open as a street for light, air, and right of access to such abutting property. This easement, of course, is subordinate to the right of the public to use the road or highway, as such right the grantor had no power to convey or affect; but is a right that binds and controls the grantor's interest in the street, whatever it may be, and gives to the grantee the right to insist that the grantor or those claiming under him shall not so use his interest in the street as to interfere with this right or easement acquired by the implied covenant contained in the grant."¹

If the boundary is in fact a way, it is immaterial whether it is called a way, or a street, avenue, lane, road, place or court. The grantor in either case is estopped to deny the existence of the way for the benefit of the grantee.²

A municipal corporation, selling lots fronting on a street and running back to uninclosed lands on commons owned by it, does not impliedly grant or dedicate to the purchasers a right of way over such commons to the rear of the lots.³

228. The implication of a grant of an easement in a street to a purchaser of a lot bounded upon it, proceeds on a construction of the grant itself.⁴ If, however, there is no reference in a deed to a street, no easement of it is implied in the grant.

Neither is there any implied grant of an easement in the street, or implied covenant that there is such a street, in case the grantor does

704, *aff'd*, 139 N. Y. 390, 34 N. E. Rep. 1052; *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. Rep. 1047.

The early cases of *Underwood v. Stuyvesant*, 19 Johns. 181, 10 Am. Dec. 215; and *In re Mercer Street*, 4 Cow. 542, are not good law on this point.

Oregon: *Lankin v. Terwilliger*, 22 Oreg. 97, 29 Pac. Rep. 268.

Pennsylvania: *Trutt v. Spotts*, 87 Pa. St. 339; *Crow v. Wolbert*, 7 Phila. 178; *McKee v. Perchment*, 69 Pa. St. 342; *Easton Borough v. Rinek*, 116 Pa.

St. 1, 9 Atl. Rep. 63; *Hobson v. Philadelphia*, 150 Pa. St. 595, 24 Atl. Rep. 1048.

¹ *Holloway v. Delano*, 64 Hun, 34, 37, 18 N. Y. Supp. 704, per Ingraham, J.

² *Franklin Ins. Co. v. Cousens*, 127 Mass. 258, 261; see § 228.

³ *Hewitt v. Pulaski* (Tenn.), 36 S. W. Rep. 878.

⁴ *Johnson v. Shelter Island Asso.*, 47 Hun, 374, 377; *Badeau v. Mead*, 14 Barb. 328; *Newman v. Nellis*, 97 N. Y. 285.

not own the fee in the land described as a street or a right of way therein.¹

The rights of the purchaser of land so bounded are not affected by the subsequent acceptance of the private street as a public street;² nor are they affected by the fact that the lines of the private street are changed, by commissioners afterwards appointed to lay out streets, so that a space is left between the lot lines and the line of the street established by the commissioners.³

But where a way or street is not used to describe the boundary of the land conveyed, but the grant is made with all the ways appurtenant to the land, the word "way" is descriptive of an existing way and not of a new right of way.⁴

A mere reference to a road or way for the mere purpose of description, as any other mark or monument might be referred to without any intention of making it an actual boundary of the land, has an effect very different from bounding the granted land on the road or way. Such a description does not convey an easement in such road or way.⁵ Where a lease refers to a street as a boundary "for the purpose of location and description merely, and not for the purpose of dedication," the lessee acquires no easement in the street which will prevent the owner from recovering full damages on a condemnation of it by the public.⁶

It has been held that there is no implication of a right of way, in case the boundary is not by the way, and this is not mentioned or referred to in any manner, and it is not essential for access to the granted land.⁷

229. There is no implication from a boundary upon a street or way that the street is open and fit for travel. There is no implied covenant that the street or way has been put into condition for present use,⁸ or that the grantor will at any time open and maintain it as a street fit for travel.⁹ The grantor in such case

¹ *Howe v. Alger*, 4 Allen, 206; *Brainard v. Boston & N. Y. Cent. R. Co.*, 12 Gray, 407.

² *Haight v. Littlefield*, 147 N. Y. 338, 41 N. E. Rep. 696.

³ *Nicklas v. Keller*, 41 N. Y. Supp. 172.

⁴ *Roe v. Siddons*, 22 Q. B. D. 224, 236.

⁵ *Lankin v. Terwilliger*, 22 Oreg. 97, 102, 29 Pac. Rep. 268.

⁶ *Pitts v. Baltimore*, 73 Md. 326, 21 Atl. Rep. 52.

⁷ *Parsons v. Johnson*, 68 N. Y. 62; *Ranscht v. Wright*, 41 N. Y. Supp. 108. See, however, *Franklin Ins. Co. v. Cousens*, 127 Mass. 258.

⁸ *Loring v. Otis*, 7 Gray, 563.

⁹ *Hennessey v. Old Colony & N. R. Co.*, 101 Mass. 540, 100 Am. Dec. 127;

Howe v. Alger, 4 Allen, 206.

cannot be compelled to grade and construct a street at his own expense so that it shall be fit for travel.¹

A conveyance of land bounded on a public street, which has been laid out by the public authorities but never opened, does not create a covenant on which the grantor is liable, in case the street is subsequently vacated by legislative authority, and the grantor entered upon and occupied the land over which it was laid out.²

If the way or street is described as being of a certain width, or as extending from one point named to another, there is an implied covenant that it shall be of the width and extent described, although such extent is beyond the land granted. If the way or street is described as staked out, the grantee is considered as having purchased under a stipulation that it shall be opened in the particular line staked out.³

230. One has no right of way over a private street or way merely because his land adjoins it. The owner of land in a city laid out into lots and streets, sold a lot fronting on a street and adjoining another lot belonging to the grantor, the south line of the lot being described as the north line of the lot retained. He afterwards filed a map on which was laid out an alley fifteen wide along the south line of the lot sold, and on the same day recorded an instrument stating that said alley was for the use of certain lots specified, not including the lot sold. It was held that the purchaser of that lot had no right to use the alley, though it adjoined his land, for the reason that the instrument of dedication of the alley did not include that lot in its benefits.⁴

A statement in a deed that "there is a passage-way on the southeasterly side of said premises, which is to be used in common with the abutters thereon," does not reserve such passage-way as appurtenant to the land of an abutting owner who had not already acquired any right in it.⁵

III. *Easement implied from Map or Plan.*

231. In like manner, if one conveys lots by a map or plat, which represents the lot as bounded upon such road or way, and the map or plat is referred to in the deed, a right of way over it passes

¹ Cole v. Hadley, 162 Mass. 579, 39 N. E. Rep. 279.

⁴ Howe v. Bell, 143 N. Y. 190, 38 N. E. Rep. 200.

² Bellinger v. Union Burial-Ground Soc., 10 Pa. St. 135.

⁵ Murphy v. Lee, 144 Mass. 371, 11 N. E. Rep. 550.

³ Thomas v. Poole, 7 Gray, 83.

as part of the grant of each lot as an easement appurtenant thereto.¹ "The *ratio decidendi* of these cases is this: that, when the grantee of a lot so platted purchases it, the existence of the streets as platted, inasmuch as they add value to the lot by the conveniences or advantages which they promise, is an inducement to the purchase, and so enters into the consideration as between the grantor and grantee, and operates by way of implied covenant, estoppel, or dedication, whichever way of operation may be the truer, to secure to the grantee a right of way over such platted streets, and reciprocally to subject any interest which the grantee may acquire therein to a right of way for the benefit of the other platted lots."²

¹ *Espley v. Wilkes*, L. R. 7 Exch. 298; *Roberts v. Karr*, 1 Taunt. 495; *Grogan v. Hayward*, 6 Sawy. 498; *Fitzgerald v. Barbour*, 55 Fed. Rep. 440.

Georgia: *Ford v. Harris*, 95 Ga. 97, 22 S. E. Rep. 144.

Illinois: *Henderson v. Hatterman*, 146 Ill. 555; *Louisville & N. R. Co. v. Koelle*, 104 Ill. 455, 461; *Zearing v. Raber*, 74 Ill. 409; *Smith v. Young*, 160 Ill. 163, 43 N. E. Rep. 486; *Cikak v. Klekr*, 117 Ill. 643, 7 N. E. Rep. 111.

Indiana: *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Haynes v. Thomas*, 7 Ind. 38; *Indianapolis v. Croas*, 7 Ind. 9; *Tate v. Ohio & M. R. Co.*, 7 Ind. 479.

Iowa: *Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358.

Kentucky: *Rowan v. Portland*, 8 B. Mon. 232.

Maine: *Dorman v. Bates Manuf. Co.*, 82 Me. 438, 19 Atl. Rep. 915; *Bartlett v. Bangor*, 67 Me. 460.

Maryland: *Hawley v. Mayor*, 33 Md. 270.

Missouri: *Tatum v. St. Louis*, 125 Mo. 647, 28 S. W. Rep. 1002; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. Rep. 735.

New Jersey: *Dill v. Camden Board of Education*, 47 N. J. Eq. 421, 20 Atl. Rep. 739, 10 L. R. A. 276; *Price v. Plainfield*, 40 N. J. L. 608; *Bayonne v. Ford*, 43 N. J. L. 292; *Attorney-General v. Morris & Essex R. Co.*, 19 N. J. Eq. 386.

New York: *Smyles v. Hastings*, 22 N. Y. 217, 24 Barb. 44; *Hennessey v. Murdock*, 137 N. Y. 317, 33 N. E. Rep. 330; *Cunningham v. Fitzgerald*, 138 N. Y. 165, 33 N. E. Rep. 840; *In re Eleventh Avenue*, 81 N. Y. 436; *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61; *Potter v. Iselin*, 31 Hun, 134; *DeWitt v. Ithaca*, 15 Hun, 568; *Johnson v. Shelter Island Ass.*, 47 Hun, 374, affirmed, 122 N. Y. 330, 25 N. E. Rep. 484, 33 N. Y. St. Rep. 514; *Cox v. James*, 45 N. Y. 557; *Taylor v. Hopper*, 2 Hun, 646, 62 N. Y. 649; *Livingston v. New York*, 8 Wend. 85, 22 Am. Dec. 622; *Rummel v. New York, L. & W. R. Co.*, 9 N. Y. Supp. 404; *Baker v. Mott*, 78 Hun, 141, 60 N. Y. St. Rep. 174, 28 N. Y. Supp. 968.

Oregon: *Carter v. Portland*, 4 Oreg. 339.

Pennsylvania: *McKee v. Perchment*, 69 Pa. St. 342; *McCall v. Davis*, 56 Pa. St. 431, 94 Am. Dec. 92.

Rhode Island: *Chapin v. Brown*, 15 R. I. 579, 10 Atl. Rep. 639.

Tennessee: *Brown v. Berry*, 6 Cold. 98, 103.

Texas: *Lamar County v. Clements*, 49 Tex. 347; *Oswald v. Grenet*, 22 Tex. 94; *Weynand v. Lutz* (Tex. Civ. App.), 29 S. W. Rep. 1097.

² *Chapin v. Brown*, 15 R. I. 579, 584, 10 Atl. Rep. 639, per *Durfee, C. J.* And

232. Whether the exhibition of a plan at the time of the sale has the same effect as a reference to the plan in a deed of conveyance, is a question which seems not to be authoritatively decided. Baron Pollock seems to have been of the opinion that such a reference would have the effect of making the plan part of the contract of purchase, though he declared that his brethren did not entertain quite the same view.¹ “But admitting that such would be the effect of a simple exhibition of the plat, it seems to us that the representation to be implied would be substantially the same as that inferred from the call of a deed bounding the premises conveyed upon a street. That is to say, it would be a representation that the premises conveyed abutted or fronted upon a strip of land over which the grantee and those claiming under him would have a right of way — a right arising from the frontage.”²

233. To create an easement of way by a plot or map there must be something to show the grantor's intention to dedicate the land for that purpose, either to purchasers of lots or to the public.³

Where a space in the rear of a lot sold was marked with dotted lines on the plat referred to for description, and with the words “reserved for private alley,” and this alley was the only means of access to an alley in the rear of the centre lots in the block, it was held that an easement of way over such alley passed by the deed.⁴

234. The plan or map so referred to becomes an essential part of the conveyance, and has the same effect that it would have if copied into the deed.⁵ The particulars shown as regards ways and streets laid out upon the plan or map are as much a part of the deed as though they were recited in it.⁶ A plan or map showing a street

see *Grogan v. Hayward*, 6 Sawy. 498, per Field, J.; *Lennig v. Ocean City Asso.*, 41 N. J. Eq. 606, 7 Atl. Rep. 491, 56 Am. Rep. 16.

¹ *Glave v. Harding*, 27 L. J. Exc. 286, 292; *Squire v. Campbell*, 1 Mylne & C. 459, 478; *Dawson v. St. Paul Fire & M. Ins. Co.*, 15 Minn. 136, 2 Am. Rep. 109.

² *Dawson v. St. Paul F. & M. Ins. Co.* 15 Minn. 136, 145, 2 Am. Rep. 109, per Berry, J.; *Ford v. Harris*, 95 Ga. 97, 22 S. E. Rep. 144.

³ *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. Rep. 687.

⁴ *Smith v. Young*, 160 Ill. 163, 43 N. E. Rep. 485.

⁵ *Noonan v. Lee*, 2 Black. 499, 504; *Smith v. Young*, 160 Ill. 163, 43 N. E. Rep. 486; *Piper v. Connelly*, 108 Ill. 646; *Glover v. Shields*, 32 Barb. 374, 379; *Ferguson's Appeal*, 117 Pa. St. 426, 11 Atl. Rep. 885; *Transue v. Sell*, 105 Pa. St. 604; *Trutt v. Spotts*, 87 Pa. St. 339, 342; *McKee v. Perchment*, 69 Pa. St. 342; *McCall v. Davis*, 56 Pa. St. 431, 94 Am. Dec. 92; *Birmingham v. Anderson*, 48 Pa. St. 253.

⁶ *Louisville & N. R. Co. v. Koelle*, 104 Ill. 453; *Henderson v. Hatterman*,

or public square cannot subsequently be changed so as to affect the rights of one who has purchased with reference to such plan or map, without his assent.¹

A person owning a farm bordering on the sea, and intersected by a road running parallel with the shore, divided the same into lots running back from the sea to and beyond the road, and prepared a map thereof upon which a certain lot was marked as a street. Soon afterwards he conveyed a lot adjoining thereto, describing the lot so marked as a "street fifty feet wide, to be kept open and used as a street for the benefit of those purchasing lots." It was held that there immediately passed to the grantee, as appurtenant to his lot, a right of access to the lot marked as a street, and of passage to and fro over its whole length and breadth, together with an easement of light, air, and prospect, and that no person subsequently deriving title from the grantor had a right to erect a bath-house upon said lot above the line of high water.²

235. Purchasers of lots by a plan which clearly shows a dedication of an open space or square to their use, acquire an easement in such space or square.³ Where the owner of land sells lots with reference to a map on which public squares are designated, the purchasers of such lots acquire an easement therein and may enjoin a railroad company from laying its track over such squares without their consent, except in the constitutional exercise of the right of eminent domain.⁴

But to have this effect the plan or map must show unequivocally that the space which is claimed to be a public square was dedicated to the public for this purpose. If the space is not inclosed in lines or marked as a public square, or for other public use, there is no sufficient indication by the plan of a dedication to the public, or to the use of the purchasers of neighboring land.⁵ A second attempt

146 Ill. 555, 34 N. E. Rep. 1041; Piper v. Connelly, 108 Ill. 646; Cihak v. Klekr, 117 Ill. 643, 7 N. E. Rep. 111.

¹ Fisher v. Beard, 32 Iowa, 346, 352; Watrous v. Blair, 32 Iowa, 58.

² Barbour v. Lyddy, 49 Fed Rep. 896. See Barnett v. Johnson, 15 N. J. Eq. 481.

³ Barclay v. Howell, 6 Pet. 498; Cincinnati v. White, 6 Pet. 431; Fisher v.

Beard, 32 Iowa, 346; Rowan v. Portland, 8 B. Mon. 232; Wyman v. New York, 11 Wend. 486; Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.

⁴ Pratt v. Buffalo City R. Co., 19 Hun, 30.

⁵ Boston Water Power Co. v. Boston, 127 Mass. 374.

to assert an easement in the space of land referred to in the case just cited was made by another owner of land in the neighborhood. The ground of the claim was that this land, which was a small triangle made by the intersection of three streets, was not inclosed by the lines marking the boundaries of these streets. Mr. Justice Holmes, delivering the opinion of the court, said: "It is true that there are no inner street lines enclosing the triangle; that the plan shows, by the street names and otherwise, that some land around the triangle was intended to be open; and that there is nothing except the equal width of the streets elsewhere to show where, if anywhere, the lines were to be drawn. But the absence of lines, if under any circumstances it could be sufficient to establish an easement in cases like the present, in this instance rather suggests uncertainty as to the details of the ultimate laying out of the land, and did not sufficiently and clearly say to a purchaser of neighboring land, this space is forever to remain vacant. * * * Its primary object is to mark the course of the avenue, and it does not necessarily import any other purpose. If the enclosed space had been considerable, the question would hardly have been raised. The fact that it is small makes no difference in the legal effect of the plan. In short, while it is undoubtedly true that the plan did not show any affirmative intention to enclose or build upon the triangle in question, we think that it is also true that the plan failed to assert a contrary intention so definitely as to give a purchaser of neighboring land an easement."¹

So far as a purchaser is concerned, a dedication of land for use as streets or public squares may be made by parol representations of the grantor, or by his acts *in pais*, that the land in question should be devoted to a public use and remain unoccupied.²

Thus where an auctioneer in selling lots adjacent to a certain block declared, that although this was platted into lots it should not be sold, but should be forever reserved as a common, it was held that this was a dedication of the block by parol, not as to the public, so that they could enforce any rights, but as to the purchasers of adjacent lots who bought with a view that this land should remain open as a common.³

¹ Williams v. Boston Water Power Co., 134 Mass. 406, 415. Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80. See Ch. XII.

² Fisher v. Beard, 32 Iowa, 346; ³ Macon v. Franklin, 12 Ga. 243.

236. If one owning land bordering on a creek divides it into lots, an easement in the creek is created in favor of purchasers by a parol agreement or representation by the owner that the creek is for the use of all purchasers of such lots, if they act upon such agreement or representation. If upon the plat by which the lots are sold the creek is expressly dedicated to the use of the purchasers of the lots, they are thereby invested with all the privileges and easements represented on the plat as appurtenant to their lots.¹

A religious camp meeting association having laid out and mapped into lots certain land on the seashore, reserving several blocks, extending from the sea inland as a camp-ground, sold lots by the map fronting on the blocks reserved, whereon the purchaser erected a summer residence. It was held, that the association thereby had entered into a covenant with the purchaser that these blocks should be devoted to the uses indicated, and that it had no right to divide these blocks into lots for the purpose of leasing them for a term of years, for the building of permanent cottages thereon.²

IV. *Grantor estopped to deny Existence of Way.*

237. In such cases the grantor is estopped to deny the existence of the street or way which he has by deed or plan represented as existing, provided he owns the street in fee, or has the right to grant such an easement.³ The rule applies to conveyances in fee

¹ Weynand v. Lutz (Tex. Civ. App.), 29 S. W. Rep. 1097.

² Lennig v. Ocean City Asso., 41 N. J. Eq. 606, 7 Atl. Rep. 491, 56 Am. Rep. 16.

³ Roberts v. Karr, 1 Taunt. 495; Espley v. Wilkes, L. R. 7 Exch. 298.

Georgia: Harrison v. Augusta Factory, 73 Ga. 447.

Illinois: Seeger v. Mueller, 133 Ill. 86, 24 N. E. Rep. 513.

Kansas: Riley v. Stein, 50 Kan. 591, 32 Pac. Rep. 947.

Maine: Dorman v. Bates Manuf. Co., 82 Me. 438, 19 Atl. Rep. 915; Sutherland v. Jackson, 32 Me. 80; Heselton v. Harmon, 80 Me. 326, 14 Atl. Rep. 286; Bartlett v. Bangor, 67 Me. 460.

Massachusetts: Cole v. Hadley, 162 Mass. 579, 39 N. E. Rep. 279; Regan

v. Boston Gas Light Co., 137 Mass. 37; Franklin Ins. Co. v. Cousens, 127 Mass. 258, 261; Tobey v. Taunton, 119 Mass. 404; Fox v. Union Sugar Co., 109 Mass. 292; Lewis v. Beattie, 105 Mass. 411; Thomas v. Poole, 7 Gray, 83; Howe v. Alger, 4 Allen, 206, 211; Rodgers v. Parker, 9 Gray, 445; Stetson v. Dow, 16 Gray, 372; Farnsworth v. Taylor, 9 Gray, 162; O'Linda v. Lothrop, 21 Pick. 292; Tufts v. Charlestown, 2 Gray, 271; Parker v. Smith, 17 Mass. 413, 9 Am. Dec. 157.

Michigan: White v. Smith, 37 Mich. 291.

Minnesota: Dawson v. St. Paul F. & M. Ins. Co., 15 Minn. 136, 142, 2 Am. Rep. 109.

Nevada: Lindsay v. Jones, 21 Nev. 72, 25 Pac. Rep. 297.

and to leases. Thus, Lord Mansfield, in an early case, observed: "If you (the lessor) have told me in your lease, this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road."¹ In a modern case Chief Baron Kelly observed: "Here the lessor, by the grant, has expressly described the land demised as abutting upon strips of land of his own to the north and the east, which he himself in the lease describes as newly-made streets, and which are distinctly delineated upon the plan, and therein called 'new streets.' The lessor, therefore, is estopped from denying that there are streets which are in fact ways, and which ways run along the north and east fronts of the houses to be built on the demised lands, including the defendant's house, and of which streets or ways the way claimed in the plea to this action is a part."²

238. But the rule is different in case of a plat made by municipal officers, who exceed the powers conferred upon them by statute. A dedication of lands by them without legal authority to the purposes of either public or private roads is wholly ineffectual. "No estoppel can ordinarily arise from the act of a municipal corporation or officer done in violation of, or without authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers, and therefore cannot be deemed to have been deceived or misled by acts done without legal authority."³

239. This rule, moreover, does not apply in case of a sale made by executors, having no interest in the land, but only a naked power over it, and the sale does not appear to have been made by a map prepared by the owner of the land, but made by the city in which the land is situated.⁴

240. Upon a sale for taxes of land which has been reserved for a passage-way, easements in which have been created by sales of lots bounding upon such way, the purchaser at the tax sale is not

New Jersey: Lennig v. Ocean City Asso., 41 N. J. Eq. 606, 7 Atl. Rep. 491, 56 Am. Rep. 16; Booraem v. North Hudson County R. Co., 40 N. J. Eq. 557, 5 Atl. Rep. 106; Bayonne v. Ford, 43 N. J. L. 292; Clark v. Elizabeth, 37 N. J. L. 120, 40 N. J. L. 172; Dill v. Board of Education, 47 N. J. Eq. 421.

New York: DeWitt v. Ithaca, 15 Hun, 568; Potter v. Iselin, 31 Hun, 134.

North Carolina: Moose v. Carson, 104 N. C. 431, 10 S. E. Rep. 689.

¹ Roberts v. Karr, 1 Taunt. 495.

² Espley v. Wilkes, L. R. 7 Exc. 298, 303.

³ Seeger v. Mueller, 133 Ill. 86, 95, 24 N. E. Rep. 513, per Bailey, J.

⁴ Bloomfield v. Ketcham, 25 Hun, 218.

estopped from interfering with the use of such passage-way. The ownership of such purchaser is not in privity with the original owner who created the easement.¹

241. Where one sells land abutting upon a street as shown by a map, but the street is never used or accepted by the public, the purchaser acquires the same right in the street, as against the grantor and against other purchasers, as he would have if it were in fact a public street. The grantor is estopped from denial that the strip of land which he described by his deed and plan, as a street, is not in fact a street so far as the purchaser is concerned.²

The purchaser of land upon a street laid down upon a map or plan as an existing highway, though not opened as such, is entitled to have the street kept open to its full width. "He is entitled to the unobstructed use of all of it. It will not do to say that the northerly half, which is upon his own property, will be sufficient for his needs. Under the implied grant, he is to have the benefit of the whole way, so that he may dispose of his property as fronting upon it, open to its full width, and reap therefrom the enhanced price that such a circumstance will bring to him."³

Where land is conveyed abutting on a proposed street, and the street extends over other lands of the grantor than those conveyed, a right to the use of the proposed street, as a means of passage to and from the lands conveyed, will arise by implication in favor of the grantee on delivery of the deed, and will continue in force until the proposed street becomes a public highway.⁴

¹ *Smith v. Griffin*, 14 Colo. 429, 23 Pac. Rep. 905.

² *Roberts v. Karr*, 1 Taunt. 495; *Espley v. Wilkes*, L. R. 7 Exch. 298; *Barbour v. Lyddy*, 49 Fed. Rep. 896, per Green, J.; *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157; *O'Linda v. Lothrop*, 21 Pick. 292; *Dill v. Board of Education*, 47 N. J. Eq. 421, 20 Atl. Rep. 739, 10 L. R. A. 276; *Child v. Chappell*, 9 N. Y. 246, relating to a canal basin; *Haight v. Littlefield*, 147 N. Y. 338, 41 N. E. Rep. 696, 69 N. Y. St. 674; *People v. Underhill*, 144 N. Y. 316, 39 N. E. Rep. 333; *Hennessy v. Murdock*, 137 N. Y. 317, 33 N. E. Rep. 330; *Lord v. Atkins*,

138 N. Y. 184, 33 N. E. Rep. 1035; *Cunningham v. Fitzgerald*, 138 N. Y. 165, 33 N. E. Rep. 840.

³ *White v. Tide Water Oil Co.*, 50 N. J. Eq. 1, 7, 25 Atl. Rep. 199. See also *Lennig v. Ocean City Asso.*, 41 N. J. Eq. 606, 56 Am. Rep. 16; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80.

⁴ *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351, 11 Atl. Rep. 751; *Booraem v. North Hudson County R. Co.*, 40 N. J. Eq. 557, 5 Atl. Rep. 106; *Dill v. Board of Education*, 47 N. J. Eq. 421, 20 Atl. Rep. 739; *White v. Tide Water Oil Co.*, 50 N. J. Eq. 1, 25 Atl. Rep. 199.

242. The streets and alleys laid down on a plat, according to which the lots upon it are sold, are dedicated to the use of the owners of such lots, and to the public, when such streets are desired for public use, and the fact that they have not been accepted as public highways makes them none the less dedicated to the use of such owners.¹ "The purchasers of the lots acquire an easement or right in the lands so laid out as streets, and have a right to pass over them, and to have them taken by the proper authorities for public streets, without compensation to the owner. By such dedication the streets do not become public highways. They are not such until accepted by the proper public authorities, or until used by the public as highways for twenty years. Until then there is no right acquired by the public, but only by the purchasers of lots, by whose consent the easements may be surrendered and the land freed from all claim by the rest of the public."²

Streets so laid down on a map and referred to in the purchase deed are streets between the parties, although they are not in condition to be used as streets and are streets only upon paper.³

When land already burdened with a perpetual and indefeasible right of private passage is taken for a public street the owner is entitled to no more than nominal damages.⁴

V. *Dedication to Private or Public Use.*

243. As between the parties the dedication to the use of the purchasers is complete upon the delivery of the deed; but the dedication to the public is complete only upon acceptance by the proper public authorities, although such acceptance may be shown by the pub-

¹ Grogan v. Hayward, 6 Sawy. 498; Knabe v. Leveille, 23 N. Y. Supp. 818, per McAdam, J.; Story v. N. Y. Elev. R. Co., 90 N. Y. 122, 11 Abb. N. C. 236; DeWitt v. Ithaca, 15 Hun, 568; In re Eleventh Ave., 81 N. Y. 436; Rummel v. New York L. & W. Co., 9 N. Y. Supp. 404; Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622; Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80; Post v. Pearsall, 22 Wend. 425, 435; Wyman v. New York, 11 Wend. 486; Breed v. Cunningham, 2 Cal. 361; Bartlett v. Bangor, 67 Me. 460; Heselton v.

Harmon, 80 Me. 326, 14 Atl. Rep. 286; Ford v. Harris, 95 Ga. 97, 22 S. E. Rep. 144; Zearing v. Raber, 74 Ill. 409; Carter v. Portland, 4 Oreg. 339; Schenley v. Commonwealth, 36 Pa. St. 62; Oswald v. Grenet, 22 Tex. 94.

² Attorney-General v. Morris & Essex R. Co., 19 N. J. Eq. 386, 391, 80 Am. Dec. 215, per Zabriskie, Ch.

³ Matter of Ladue, 118 N. Y. 213, 220, 23 N. E. Rep. 465.

⁴ Bartlett v. Bangor, 67 Me. 460, 468; Stetson v. Bangor, 60 Me. 313; Sutherland v. Jackson, 32 Me. 80.

lic use of the streets.¹ Until such acceptance the public has no right in such streets, but only the purchasers of the lots bounding upon the streets have rights therein. Such persons may consent to surrender their easement in the streets, and to join in a dedication of them to the public. "Indeed, whenever a dedication as a public highway is effected — as it usually is — by means of conveyances to private persons by reference to a proposed street over other lands of the grantor, the private rights of the several grantees precede the public right, and are the source from which the public right springs. By such conveyances the grantees are regarded as purchasers by implied covenant of the right to the use of the street, as a means of passage to and from their premises, as appurtenant to the premises granted, and this private right of way in the grantees is wholly distinct from and independent of, the right of passage to be acquired by the public; * * * and it is upon the theory that the owner of the fee, by grants of rights of way in the street to his grantees, has parted with all beneficial ownership in the street, that the public authorities may take it for a public highway, without any compensation to him."²

244. The purchaser of land bounded upon a public street has a private right of way appurtenant to his lot, which he holds by an implied covenant that the street in front of his lot shall be kept open for his enjoyment, if not as a public street, then as a private way; and for an obstruction of it to his special damage he may maintain an action.³

Where a right of way has been dedicated to the public for public uses, but not accepted, owners of lots granted upon such way still have private rights in the land so offered, but their rights are no better than those which were offered to the public.⁴

¹ *Grogan v. Hayward*, 6 Sawy. 498; *DeWitt v. Ithaca*, 15 Hun, 568; *Strong v. Brooklyn*, 68 N. Y. 1; *Niagara Falls Suspension B. Co. v. Bachman*, 66 N. Y. 261, 269; *Matter of Ingraham*, 4 Hun, 495; *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61; *Wiggins v. McCleary*, 49 N. Y. 346; *Wyman v. New York*, 11 Wend. 486; *Livingston v. New York*, 8 Wend. 85, 22 Am. Dec. 622; *Haight v. Littlefield*, 147 N. Y. 338, 41 N. E. Rep. 696, 69 N. Y. St. Rep. 674; *People v. Underhill*, 144 N. Y. 316, 326, 33 N. E. Rep. 333; *Ford v. Harris*, 95 Ga. 97, 101, 22 S. E. Rep. 144.

² *Booraem v. North Hudson County R. Co.*, 40 N. J. Eq. 557, 564, 5 Atl. Rep. 106, per Depue, J. And see *Prudden v. Morris & E. R. Co.*, 19 N. J. Eq. 386, 391; *White v. Tide Water Oil Co.*, 50 N. J. Eq. 1, 25 Atl. Rep. 199; *Dorman v. Bates Manuf. Co.*, 82 Me. 438, 19 Atl. Rep. 915; *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. Rep. 687. As to Dedication to the Public, see chapter XII.

³ *Tate v. Ohio & Miss. R. Co.*, 7 Ind. 479; *Haynes v. Thomas*, 7 Ind. 38.

⁴ *Tapert v. Detroit G. H. & M. R. Co.*, 50 Mich. 267, 15 N. W. Rep. 450.

Until a dedication to the public has been accepted, or the public has otherwise acquired a right of way, the purchaser of land on the street to whom the use of the street has been dedicated, may treat any obstruction of it as an invasion of his rights and may maintain an action for the damage.¹

After the street has been accepted or acquired by the public, an obstruction of it is a public nuisance for which a purchaser of land upon it can sustain no action without proof of special damages not common to others.²

245. Upon the discontinuance of a highway by act of law, the owner of the fee cannot deprive his grantee of easements in it which he holds by grant, implied from the bounding of the land upon the highway although upon such discontinuance the land reverts to such grantor.³ “If by act of law the public right or easement in the highway has ceased; there is no reason for saying that, as against the grantor of the abutting land, any right to the continuance of private easements has been lost to the grantee. At least, the principal argument for the other view is that the possible discontinuance of the highway was a contingency which the parties must or should have considered. But is that quite just? Had the grantee not the right to assume that, with the fee of the highway in the grantor, in conveying lands with boundaries given upon the highway, together with all the appurtenances, easements, advantages, and privileges, he intended to and did, impliedly, if not in express terms, warrant to his grantee, as far as he was concerned, the continuance of the open space in front of the land, for all the beneficial purposes which it could subserve, even if the public easement should cease? When it is said that the land of a highway which has been discontinued reverts to primary conditions of ownership, obviously, it is to be understood that such ownership is not thereby relieved of burdens created by the original owner.”⁴

On the discontinuance of a portion of a highway to which a gran-

¹ Sutherland v. Jackson, 32 Me. 80.

Ind. 479; Sohn v. Cambern, 106 Ind.

² Hubert v. Groves, 1 Esp. 148; Sutherland v. Jackson, 32 Me. 80, 85; Rummel v. New York L. & W. R. Co., 9 N. Y. Supp. 404; Decker v. Evansville Suburban & N. Ry. Co., 133 Ind. 493, 33 N. E. Rep. 349; Dwenger v. Chicago & Grand Tr. Ry. Co., 98 Ind. 153; Tate v. Ohio & Miss. R. Co., 7

302, 6 N. E. Rep. 813; Powell v. Bunker, 91 Ind. 64; Terre Haute & L. R. Co. v. Bissell, 108 Ind. 113, 9 N. E. Rep. 144.

³ Parker v. Framingham, 8 Met. 260; Plitt v. Cox, 43 Pa. St. 486.

⁴ Holloway v. Southmayd, 139 N. Y. 390, 406, 34 N. E. Rep. 1047, per Gray, J.

tee of lands not bordering thereon has a right of way of necessity, and the reversion of the lands to the grantor, the grantee does not retain a right to pass over the discontinued portion to reach a new highway; but his remedy is a right to damages for being cut off from his only means of reaching his land.¹

246. The discontinuance of a highway upon which one has bounded the lands conveyed, does not defeat his grantee's right of way, the fee of the highway being in the grantor. "It is a settled rule," says Chief Justice Shaw, "that when land is granted, described as bounding on a way, it is an implied covenant that there is such a way; that, so far as the grantor is concerned, it shall be continued; and that the grantee, his heirs and assigns, shall have the benefit of it. It seems reasonable, and quite within the principle of equity on which this rule is founded, to apply it to the discontinuance of a highway; so that if a man should grant land bounding expressly on the side of a highway, if the grantor own the soil under the highway, and the highway, by competent authority should be discontinued, such grantor could not so use the soil of the highway as to defeat his grantee's right of way, or render it substantially less beneficial. Whether this should be deemed to operate as an implied grant, or as an implied warranty, covenant, and estoppel, binding on the grantor and his heirs, is immaterial."²

VI. *Extent of the Right Granted.*

247. When land is sold by reference to a plan, upon which several streets and avenues are laid out, the grantee does not necessarily acquire an easement in all such streets or ways. He acquires an easement in the street or way upon which his lot is situated, and in such other streets or ways as are necessary or convenient to enable him to reach a highway. He acquires no easement in a street or way which his land does not touch, and which does not lead to a highway; and he is not entitled to an injunction or other remedy by the reason of an obstruction to such street or way.³

¹ *Morse v. Benson*, 151 Mass. 440, 24 N. E. Rep. 675.

² *Parker v. Framingham*, 8 Met. 260, 267. Also *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. Rep. 1047. See, however, *Wheeler v. Clark*, 58 N. Y. 267; *Underwood v. Stuyvesant*, 19 Johns. 181, 10 Am. Dec. 215; *Darker v.*

Beck, 32 N. Y. St. Rep. 193, 11 N. Y. Supp. 94; *Bellinger v. Union Burial Ground Soc.*, 10 Pa. St. 135.

³ *Pearson v. Allen*, 151 Mass. 79, 23 N. E. Rep. 731; *Regan v. Boston Gas Light Co.*, 137 Mass. 37; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Rodgers v. Parker*, 9 Gray, 445; *Tobey v. Taun-*

One purchasing a house lot by reference to a recorded plat, upon which many lots were represented fronting upon streets, is entitled to an unobstructed street in front of his lot, and to the use of such other streets represented upon the plat as he may have occasion to use. If the street upon which his lot fronts is shown upon the plan as unobstructed, though in fact at the time of the purchase it was closed by a gate, he may remove the gate and may have an injunction against the placing of any gate across the street. Although the purchaser has a right to free passage over any of the streets represented upon the plan, yet if these streets are remote from his lot, and it does not appear that he has any occasion to use them, an injunction will not be issued against the erection of fences or gates across such streets, but he will be left to his remedy at law.¹

In a New York case it was held that a deed and plan indicating a public way would not extend the right beyond the next cross street on each side of the land conveyed.²

In a Massachusetts case, where the purchaser of a lot claimed an easement in a triangular piece of land shown on the plan referred to in his deed, and it appeared that this triangular piece was one hundred and seventy-six feet from the land purchased, and that there were intervening streets, it was held that such purchaser did not have an easement in such triangular piece.³

248. A purchaser is not limited to the way upon which his land is bounded, but may use other ways represented upon his grantor's plan to reach a public road.

Where the owner of land laid it out in lots traversed by two connecting passage-ways, as represented on a recorded plan, and conveyed some of the lots by deeds referring to the plan, with a right appurtenant to each of them to pass and repass over the ways in common with himself, his heirs and assigns, it was held that the

ton, 119 Mass. 404; *Bartlett v. Bangor*, 67 Me. 460, 467; *Bell v. Todd*, 51 Mich. 21, 16 N. W. Rep. 304; *Johnson v. Shelter Island Asso.*, 47 Hun, 374; *In re Lewis Street*, 2 Wend. 472; *Badeau v. Mead*, 14 Barb. 328.

¹ *Chapin v. Brown*, 15 R. I. 579, 10 Atl. Rep. 639.

² In the Matter of Twenty-ninth Street, 1 Hill, 189, 190, *Bronson, J.*, said: "I do not say that this dedica-

tion will extend to all his lands in the site of the street, however remote from the lots sold; but it will, I think, extend to all his lands in the same block — or, in other words, to the next cross street or avenue on each side of the lots sold. The parties must have contemplated an outlet both ways."

³ *Boston Water Power Co. v. Boston*, 127 Mass. 374

right reserved to himself in both ways was appurtenant to each of the remaining lots, and passed without express words to a subsequent grantee of one of them, although his lot bounded only upon one of the ways. The grantee of such lot is not restricted to the single passage-way upon which his lot is bounded. "The law will imply in his favor the right to use the passage-way upon which he is bounded, not only for the purpose of going back and forth upon it, but also for the purpose of reaching the public ways, by means of such other avenues as his grantor has, by his plan, represented to exist. If there are two or more of such avenues, it is not for the grantor to say that his grantee shall be restricted to one only. The deed is to be taken most strongly against him, and in furtherance of the beneficial operation of his grant."¹

A right of way in an alley, granted as appurtenant to a lot of land conveyed, implies, *ex vi termini* a passage-way leading from such lot; and when there is an existing way leading from such lot to a street, which is owned or controlled by the grantor, the easement is not limited to a mere open space in the rear of such lot, shut in on all sides by lands over which the grantee has no right to pass. Such a space leading nowhere would not be an alley and could not be used for a right of way.²

249. Where land conveyed is bounded upon a way which appears to be a continuous way, but which in fact was laid out at different times by two different owners as appurtenant to separate estates, and the deed gives a right of way from the lot conveyed to a street named, the grantee takes a right of way only to such street, and has no rights in an extension of the passage-way in the opposite direction laid out as appurtenant to another estate, even though the grantor had rights therein. "A deed in which the premises conveyed are bounded on a defined and existing passage-way gives to the grantee by estoppel rights not only in that part which adjoins his own land, but also by necessary implication in such portion of the whole way as will make the same available and useful as an appurtenance to the estate granted. The extent of the grantee's right beyond the limits of his land will depend upon the nature and character of the way, and its connection with the public streets as affording a convenient outlet from his land. When the extent or limits of the way are defined in the deed by reference to a plan or

¹ Fox v. Union Sugar Refinery, 109 Mass. 292, 297, per Wells, J

² Smith v. Smith, 46 Mich. 301, 9 N. W. Rep. 425.

otherwise, the estoppel is not confined to so much of the way as is necessary for the enjoyment of the granted premises, but extends to the whole way as defined. * * * In the case at bar, the passage-way to the extent claimed by the plaintiff was not defined in the deed under which he claims, nor by reference to a plan showing that the whole passage-way was laid out for the benefit of all the abutting lots. It was, as we have seen, laid out by different owners at different times, and not as a common passage-way for a number of lots intended to be conveyed by the grantor to several different grantees.”¹

A conveyance giving a right of way defined by the deed or by a plan, referred to as extending from one monument to another, passes an easement in the whole extent of the way so defined, although it extends beyond the land granted.² If the plan referred to in a deed of a lot upon a street indicates a street opening at each end into other streets, the purchaser has a right of way over the entire street as indicated upon the plan.³

If the way leads to a street in one direction, but is closed in the other, terminating within the owner's own land, so that it is only a place or *cul de sac*, the purchaser of a lot fronting on such place, acquires a right of way from his lot to the street, but no right over the portion of the place beyond his lot, towards the closed end, and he has therefore no standing to ask to have an obstruction of that part of the place enjoined.⁴

250. Such easement is a perpetual one and is not lost by mere lapse of time or non-user, unless by express abandonment or by conduct on the part of the owner of such land which is tantamount to an abandonment. Of course the right might become stale by a long lapse of time, or by non-user under circumstances showing an intention on the part of the owner never to claim or use the right. Such an easement passes to the successors in title of the original purchaser as appurtenant to the land.⁵

251. Where lots were sold as numbered upon a plan upon which appeared a strip of land left open, as if for a passage-way, though it was not called so on the plan, a purchaser of land adjoin-

¹ Langmaid v. Higgins, 129 Mass. 353, 356, per Colt, J.

² Langmaid v. Higgins, 129 Mass. 353; Rodgers v. Parker, 9 Gray, 445; Thomas v. Poole, 7 Gray, 83.

³ Rodgers v. Parker, 9 Gray, 445.

⁴ Mahler v. Brumder, 92 Wis. 477, 66 N. W. Rep. 502. See also Pearson v. Allen, 151 Mass. 79, 23 N. E. Rep. 731.

⁵ Ford v. Harris, 95 Ga. 97, 22 S. E. Rep. 144.

ing such strip cannot maintain an action against another purchaser for trespass in using the strip for a passage; for if the deed gave a right to use this land for a passage, it gave no exclusive right to any one purchaser.¹

An owner of land between the seashore and an avenue subdivided the land and established one of the lots as a street leading from the avenue to the water, and conveyed another of them by deed which recited that the street in question should be kept open and used as a street for the benefit of those purchasing lots. Afterwards the executors of the owner conveyed certain of the lots in question, together with the street so dedicated, to the same grantee including the right to erect a bath-house upon the seashore in front of such street. It was held that the interest conveyed by the executors was previously impressed with the easement created by the owner's subdivision and deeds, and that the purchaser had no right to obstruct the same by building a bath-house on any part of the street in question.²

252. An easement cannot be made appurtenant to separate and distinct premises without a specification of the right. A conveyance of land by a map or plan upon which are represented parks and avenues, with which the property conveyed has no immediate connection, does not pass any easement in such parks and avenues appurtenant to the land conveyed. The conveyance only passes a right in such parks and streets as are necessary to the beneficial enjoyment of the granted land. A symbolical indication upon a map to denote a public park or place is quite too uncertain and indistinct to constitute the foundation of a legal right.³

253. A purchaser of land bounding the private way has an easement in it as it exists at the time of his purchase, and if the grantor cuts down the grade of the way so as to interfere with the purchaser's access to it, he is liable to an action for the damage occasioned to the purchaser; but he cannot be restrained from improving portions of the avenue of the street not in front of the purchaser's land.⁴

¹ O'Brien v. Flynn, 158 Mass. 198, 33 N. E. Rep. 500. 374. And see Badeau v. Mead, 14 Barb. 328.

² Fitzgerald v. Barbour, 55 Fed. Rep. 440. ⁴ Cunningham v. Fitzgerald, 138 N. Y. 165, 33 N. E. Rep. 840.

³ Johnson v. Shelter Island, 47 Hun

CHAPTER VI.

WAYS BY IMPLIED GRANT.

Implied grant of a Way upon Severance of an Estate, 254-265.

Ways by Implied Grant.

254. A way is not a continuous easement.¹ Therefore a way, which has been used merely to accommodate different parts of the same estate, will not pass by implication upon the severance of the estate, and the conveyance of one part without particular mention of such way. It is not sufficient that there is a marked path for travel upon the land. The way does not pass unless it is a way of necessity or is a formed or inclosed way, within an exception to the rule presently to be referred to.

¹ Brown v. Alabaster, 37 Ch. D. 490, 507; Watts v. Kelson, L. R. 6 Ch. 166; Worthington v. Gimson, 2 El. & El. 618, 29 L. J. Q. B. 116; Polden v. Bastard, L. R. 1 Q. B. 156; Brett v. Clowser, 5 C. P. D. 376; Langley v. Hammond, L. R. 3 Exc. 161; Thomson v. Waterlow, L. R. 6 Eq. 36; Wheeldon v. Burrows, 12 Ch. D. 31; Pheysey v. Vicary, 16 M. & W. 484; Whalley v. Thompson, 1 Bos. & P. 371. See §§ 126-157.

Louisiana: Cleris v. Tieman, 15 La. Ann. 316; Fisk v. Haber, 7 La. Ann. 652.

Maine: Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748; Stevens v. Orr, 69 Me. 323.

Maryland: Oliver v. Nook, 47 Md. 301; Mitchel v. Seipel, 53 Md. 251, 36 Am. Rep. 404.

Massachusetts: Pettingill v. Porter, 8 Allen, 1, 85 Am. Dec. 671; Oliver v. Pitman, 98 Mass. 46, 50; Grant v. Chase, 17 Mass. 443, 9 Am. Dec. 161.

Michigan: Morgan v. Meuth, 60 Mich. 238, 27 N. W. Rep. 509.

Mississippi: Bonelli v. Blakemore, 66 Miss. 136, 5 So. Rep. 228.

New Jersey: Kelly v. Dunning, 43 N. J. Eq. 62, 70, 10 Atl. Rep. 276; Fetters v. Humphreys, 19 N. J. Eq. 471, 18 N. J. Eq. 260; Stuyvesant v. Woodruff, 21 N. J. L. 133, 47 Am. Dec. 156.

New York: Outerbridge v. Phelps, 58 How. Pr. 77, 13 Abb. N. C. 117, 13 J. & S. 555; Shoemaker v. Shoemaker, 11 Abb. N. C. 80, 85, 8 Abb. N. C. 80; Parsons v. Johnson, 68 N. Y. 62, 66, 23 Am. Rep. 149; Longendyke v. Anderson, 101 N. Y. 625, 629, 4 N. E. Rep. 629; Scrymser v. Phelps, 33 Hun, 474.

Pennsylvania: Kieffer v. Imhoff, 26 Pa. St. 438; McCarty v. Kitchenman, 47 Pa. St. 239.

South Carolina: Elliott v. Rhett, 5 Rich. L. 405, 57 Am. Dec. 750.

Vermont: Plimpton v. Converse, 42 Vt. 712.

West Virginia: Standiford v. Goudy, 6 W. Va. 364.

A right of way, which has been used by the owner for the benefit of the portion of the land conveyed over his remaining land, does not pass upon severance unless the proper terms are employed in the conveyance to show an intention to create the right anew, such, for instance, as "with the ways now used with the land hereby conveyed."¹ A right to go to a well and take water is not a continuous easement and does not pass by implication without words of grant.²

The owner of two adjoining dwelling-houses conveyed one of them by a deed which did not include or mention a passage-way covered by the building retained, though the grantee was informed at the time of his purchase that the right to use the way did not pass with the house. It was held that no right of way existed in favor of a subsequent purchaser of the same house, who bought without any assurance about the passage-way from the original owner of the house.³

Upon a partition of a farm between tenants in common, each conveying to the other an undivided moiety, "with easements and appurtenances," it was held that a right of way from the one part to the other, which had been used by the occupants of the farm for many years, did not pass under the deeds of partition as incident to the separate enjoyment of either part, because the right was not an apparent and continuous easement, necessarily passing upon the severance of the property. Crompton, J., for the Court of Queen's Bench, said: "In the present case the parties have not used apt words in the deed to express an intention to pass the way in dispute, and the general words which follow the description of the property intended to be conveyed do not add to or alter the previous words of conveyance. * * * It would be a dangerous innovation if the jury were allowed to be asked to say, from the nature of a road, whether the parties intended the right of using it to pass. It may, besides, be very naturally supposed to have been the intention of the parties that, on the partition of the property, all ways not incident to the separate enjoyment of each of the severed portions should cease."⁴

¹ Pearson v. Spencer, 1 Best & S. 571; ³ McPherson v. Acker, MacArthur, Oliver v. Hook, 47 Md. 301; see §§ 143, & M. 150, 48 Am. Rep. 749.
153.

⁴ Worthington v. Gimson, 2 El. & El.

² Polden v. Bastard, L. R. 1 Q. B. 618, 626.
156, aff'g 4 B. & S. 258

255. A way implied must be reasonably necessary,¹ if not strictly so, as some hold.² “If we adopt any other rule than that of strict necessity, we open a door to doubt and uncertainty, to the disturbance and questioning of titles, and to controversies as to matters of fact, outside of the language or boundaries of the deed. If an estate, fully granted without exception or reservation, can be encumbered forever by an easement, or right of use by a third party, by the finding of a jury that such use would be highly convenient, or that it was exercised by a former owner, or was notorious, or any other ground short of strict necessity, the sanctity and security of titles by deeds, exact and precise in their terms, would be seriously shaken and impaired. The record gives no notice of any such right or easement.”

The owner of a tract of land conveyed a portion of it upon which there was a well, reserving the right to use the well for his homestead estate which comprised the remainder of the tract. The owner devised the land between the house and the land conveyed, on which was the well, and also devised the remainder of the homestead estate to another person. The owner of the land between the house and the well denied the right of the devisee of the house to pass over his land to the well. It was held that a right of way across this land could not be claimed as a way of strict necessity, and that it could not be implied from the circumstances of the case as a way reasonably necessary. “If the grant of a way, existing previously *de facto*, can be implied from anything short of necessity, we think at any rate that the party claiming the way should be required either to show that,³ without the use of the way, he will be subjected to what, considering the value of the granted estate, will be an excessive expense; or to show⁴ that there is a manifest and designed dependence of the granted estate upon the use of the way, for its appropriate enjoyment, or to adduce some other indication equally conclusive.”⁵

Upon a conveyance of a parcel of land, the grantor retains no right of way over it to and upon his adjoining land, unless he expressly reserves the right, or it is implied as a way of necessity,

¹ §§ 154-157.

² Warren v. Blake, 54 Me. 276, 289, 386.
89 Am. Dec. 748, per Kent, J.

³ As in Pettingill v. Porter, 8 Allen, 1, 85 Am. Dec. 671.

⁴ As in Thompson v. Miner, 30 Iowa, 386.

⁵ O'Rorke v. Smith, 11 R. I. 259, 264, per Durfee, C. J., citing Worthington v. Gimson, 2 El. & El. 618; Leonard v. Leonard, 7 Allen, 277, 283.

although there is existing a way over the granted land, which has been known as a street, and was so marked on a plan.¹

256. The rule is different if in conveying part of an estate there is anything showing an intention to give a right in a way on the part retained. The owner of an estate called Roseville, with a dwelling-house and stable upon it, being also the owner of an adjoining farm, having a private road which led from a high road to the farm buildings, and passed close to one side of the stable, leased the dwelling-house and stable for a term of years, and the tenant built a hay loft over the stable, with openings towards the private farm road, and used the road to reach the hay loft during the term of the lease. The owner afterwards conveyed in fee the estate which had been leased, together with all the ways, easements and appurtenances thereto appertaining, "or with the same or any of them now or heretofore demised," etc. It was held that the right to use the farm road to reach the hay loft passed under the words describing the rights of way. Blackman, J., said: "It is not disputed that if the conveyance had stopped at the word 'appertaining,' the plaintiff's case might not have been sustainable, but it goes on to add the words 'or with the same or any of them now or heretofore demised,' etc.

* * * The tenant for the time being of Roseville continued to use the road as appurtenant to it, and had the apparent necessity of using it for the purpose of getting to two large openings in the loft, exactly in the same way as if the consent of the defendant had been in writing, and a wafer stuck on it. There would not have been the slightest difference in the use and enjoyment of the road. In the one case it would have become appurtenant, and in the other case it would only have been enjoyed as if it were appurtenant. I think, in considering the words, we should see what they really mean, and apply them to the state of circumstances existing at the time of the conveyance; and I think this right to carry hay and straw to these two openings was in point of fact then occupied and enjoyed, and reputed as appurtenant to these premises."²

257. The use of the word "appurtenances" in a deed, by one conveying a part of his land for the benefit of which he has previously used a way over his remaining land, adds nothing to the effect

¹ Sterrick v. McBride, 157 Ill. 70, 41 N. E. Rep. 744. Is not this decision contrary to Cihak v. Klekr, 117 Ill. 643, 7 N. E. Rep. 111. ² Kay v. Oxley, L. R. 10 Q. B. 360, 368.

of the deed as passing any interest in such way. The use of the word is proper to convey an easement already existing in favor of the grantor, but it is not sufficient to create an easement where none existed before.¹ If a right of way exists in such case it is because it is implied from the general grant as a way of necessity.

258. The word "appurtenances" used in describing a portion of a severed estate has been wrongly held to pass a right of way over the portion granted or reserved. "No doubt the word 'appurtenances' is not apt for the creation of a new right, and the word 'appurtenant' is not apt to describe a right which had never previously existed; and therefore the mere grant of all appurtenances or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way, where the right was not pre-existing at the date of the grant. But from as long ago as the fourth year of Philip and Mary² the word 'appurtenances' has easily admitted of a secondary meaning, and as equivalent in that case to 'usually occupied.'"³

The word cannot have this effect unless it is applied to a formed and existing way. "When in order to maintain the right which it is sought to enforce, it is necessary, not only to create the right to use the thing, but also to create the thing itself which is to be used, the *prima facie* meaning of the words will be rebutted. In the present case the thing to be used is a road leading up to the plaintiff's premises, and to be used with them, and, in order that it may be used, you would have to create the road itself. Again, though perhaps this is only another mode of stating the same proposition, when, in order to maintain the alleged right, it is necessary to alter the physical condition of the property from what it is at the time of the grant to what it formerly was, this also prevents the ordinary general words from being treated as disclosing any intention to give the right."⁴

¹ See §§ 23, 24; Stevens v. Orr, 69 Me. 323; Warren v. Blake, 54 Me. 276; Longendyke v. Anderson, 101 N. Y. 629, 4 N. E. Rep. 629; Parsons v. Johnson, 68 N. Y. 62, 66, 23 Am. Rep. 149; Scrymser v. Phelps, 33 Hun, 474; Kenyon v. Nichols, 1 R. I. 411; Oliver v. Hook, 47 Md. 301; Bonelli v. Blake-more, 66 Miss. 136, 5 So. Rep. 228; Barker v. Clark, 4 N. H. 380.

² Hill v. Grange, Plowd. 164, 170.

³ Thomas v. Owen, 20 Q. B. D. 225, 231, per Fry, L. J.; Whalley v. Tompson, 1 Bos. & Pul. 371.

See also as to the use of the word "appurtenances," §§ 23, 24, 132.

⁴ Roe v. Siddons, 22 Q. B. D. 224, 235, per Lord Esher, M. R.

259. Whether words granting all ways “used or enjoyed” with the granted or severed part pass such ways is a question upon which the authorities are not agreed. Some of the earlier cases hold that the right of way does not pass in such case although the conveyance is executed on these words “together with all ways, easements and appurtenances thereto belonging and with the same now or heretofore occupied or enjoyed.” These words apply only to rights of way then existing and appurtenant to the grantor’s land. They do not apply to a way which was simply used by the grantor for his own convenience in the management of his property. No one but the owner has the right to use such a way, and the word “right” imports that at some time some person other than the owner had the right of going over it. Of course every absolute owner of property can go over it in any direction he pleases.¹ These general words describing the ways appurtenant to the land granted are held not to apply to ways actually used with the land granted which had been constructed over the grantor’s adjoining land, but which did not exist before the unity of possession; but the ways will pass by such description only if they had existed before the unity of possession.

In later cases, however, this distinction is disapproved. Thus Lord Blackburn in one case said:² “It cannot make any difference in law whether the right of way was only *de facto* used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right *de novo*, in the other merely revived. But it makes a great difference, as matter of evidence on the question, whether the way was used and enjoyed as appurtenant.” In another case Mr. Justice Fry said:³ “I think that when there are two adjoining closes, and there exists over one of them a formed and constructed road, which is in fact used for the purposes of the other, and that other is granted with the general words ‘together

¹ Thomson v. Waterlow, L. R. 6 Eq. 36; Langley v. Hammond, L. R. 3 Exc. 161; Plant v. James, 5 B. & Ad. 791, where it was held that these general words passed a right of way is discussed and criticized in the above cases, and in turn these cases are examined in Kay v. Oxley, L. R. 10 Q. B. 360, and in

Barkshire v. Grubb, 18 Ch. D. 616, the correctness of the decisions not being doubted, but the grounds which the decisions were put.

² Kay v. Oxley, L. R. 10 Q. B. 360, 367; Polden v. Bastard, L. R. 1 Q. B. 156.

³ Barkshire v. Grubb, 18 Ch. D. 616, 622.

with all ways now used or enjoyed therewith,' a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously."

260. This distinction is still further disapproved in a later case, where a railway company had purchased a piece of land on which there was a stable. By the conveyance to the company the premises were granted together with all "rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had many years previously made a private road from the highway to the stable, over his own land for his own convenience and had used it ever since. The soil of this road was not conveyed to the company and no express mention of it was made in the conveyance. It was held that notwithstanding the unity of possession of the stables and the private road at the date of the conveyance to the company, a right of way passed to the company under the general words in the conveyance. Lord Justice Bowen said: "It seems to me that the grantor intended to give, and that the company should have, all such rights in the nature of rights of way as were *de facto* occupied or enjoyed at that time as appurtenant to the premises. It is quite true that this at the moment of the grant was not a right of way. It was only a way. Does that make a difference? That again is a question of construction." After commenting upon the cases already cited in this section, the learned justice continued: "But these cases, as summed up and expounded by Lord Justice Fry in the recent decision of *Barkshire v. Grubb*,¹ show this, that the mere fact that the way did not exist as a right of way before unity of possession, and was only enjoyed as a way before unity of possession, will not prevent the court putting such a construction upon general words, which, *prima facie*, might apply to rights, and not to ways enjoyed *de facto* only, as is to be gathered from the true intention of the parties."²

261. If the use of a way is defined by the conveyance, there can be no implied grant of its use from the manner the grantor had used it prior to the severance of his tenement. Thus, where there was a grant of the coal under a certain tract of land, with a right of way over the grantor's other land for the purpose of mining and

¹ 18 Ch. D. 616, 622.

v. Oxley, L. R. 10 Q. B. 360, and Watts

² Bayley v. Great Western Ry. Co., 26 Ch. D. 434, 453, 455, following Kay v. Kelson, L. R. 6 Ch. 166; Hinchcliffe v. Earl of Kinnoul, 5 Bing. N. C. 1, 25.

carrying away the coal, the grantee had no right to take through the pit, or over the surface of the land, coal from an adjoining tract owned by him, although the grantor, while owning both tracts, used a visible road or way over the surface to transport the coal from the other tract; for the deed expressly limits the grant of the way to mining and removing the coal lying beneath the tract described. The terms of the grant are a complete negation of any claim that the use of the way by reason of the alleged easement appurtenant to the adjoining tract and the coal beneath it became unrestricted.¹

262. There has been some departure from the general rule that a way will not pass by implication unless it be a way of necessity. Where the owner of a farm divided it by his will in to two portions, devising them to two persons, and the portion of one was land locked so that in order to reach it it was necessary that he should have a right of way over the property of the other, and the devisor during his life had used a way in a certain direction over that property, it was held that a right to use that way passed by the devise. It was held, not that a way of necessity passed, but that this particular way passed. The ground of the judgment given by Chief Justice Erle is this: "We have been much struck with the argument of Mr. Mellish in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the court below on the construction and effect of the will taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property; he intended to create two distinct farms, with two distinct dwelling-houses, and to leave one to the plaintiff, and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the

¹ Webber v. Vogel, 159 Pa. St. 235, 28 Atl. Rep. 226.

state it is in when devised, upon the adjoining tenement. There are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependence on the plaintiff's land of a right of way over it in the customary manner.”¹

263. Whether there is an exception to the general rule in the case of division of a building in order to give access to one part by stairs or passage-ways in another part, or whether such a way arises as a way of necessity is not made clear by decisions.²

Where a building was so constructed that there was no access to upper stories except by a stairway in a room of the first story, and the owner conveyed the second story, which was used for offices, which were visibly dependent for means of access upon this stairway, it was held that a right to use the stairway passed to the purchaser, as an easement appurtenant to the premises conveyed. “It is a well-settled doctrine of the law of easements,” said the court in this case, “that where there are no restrictive words in the grant, the conveyance of the land, will pass to the grantee, all those apparent and continuous easements which have been used, and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted; and also, all that appear to belong to it, as between it, and the property which the vendor retains; and hence, when the owner of an entire estate makes one part of it visibly dependent for the means of access upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee, as accessorial to the beneficial use and enjoyment of the land.”³

Where tenants in common, owners of contiguous lots, built thereon a block of buildings covering the entire land with one stairway and hall leading to the second and third stories thereof, afterwards partitioned the property between themselves, it was held, that their agreement as to the plan of construction and the erection of the building in accordance therewith, created an easement in the stair-

¹ *Pearson v. Spencer*, 3 B. & S. 761, 767. This case is distinctly an advance of the doctrine that only a way of necessity can pass by an implied grant or reservation upon the severance of an

estate. Per Kay, J., in *Brown v. Alabaster*, 37 Ch. D. 490, 503.

² See § 217.

³ *National Exch. Bank v. Cunningham*, 46 Ohio St. 575, 587, 22 N. E. Rep. 924, per Williams, J.

way and hall appurtenant to each of the lots, which passed to each by their mutual deeds of partition, notwithstanding the covenants of warranty in such deeds; and their failure to make any reservations of the easements in such deeds.¹

A building contained two stores with a hall extending over both which was used for public meetings, entertainments and the like. The south store included a stairway which was the only entrance to the hall above. The owner conveyed this store without any express reservation of the use of the stairway and afterwards conveyed the other store to another grantee. By these conveyances the grantees became the owners in common, of the hall, and of the fixtures and furniture therein.

It was held that a reservation with a right to use the stairway would be implied in favor of the last named grantee.²

264. There is a tendency in recent cases to regard a way as a continuous and apparent easement, which will pass upon the severance of a tenement in the same manner as any such easement. A house was divided into a front and back block, and a lease was made of three rooms on the first floor in the back block without expressly granting any mode of access from the street. The mode of access used was by passing through a hall or vestibule in the front block and then up some stairs. A railway company, in the exercise of compulsory powers, took down the front block of the house and removed the hall, and this interference with the hall and injury to the access to the rooms lessened their value. It was held, that the lessee was entitled to compensation for the injury done; and that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms. Lord Justice Bowen said:³ “Now, it seems to me, that the access to the demised premises falls distinctly within

¹ Thompson v. Miner, 30 Iowa, 386; Morrison v. King, 62 Ill. 30; Geible v. Smith, 146 Pa. St. 276, 23 Atl. Rep. 437; Pierce v. Cleland, 133 Pa. St. 189, 19 Atl. Rep. 352. In Dillman v. Hoffman, 38 Wis. 559, it was left undecided whether upon a conveyance of part of a structure dependent for access above on common stairs, passages and halls, the doctrine of easements in ways of necessity applies as in Thompson v. Miner, Morrison v. King, and perhaps other cases; or whether in such a case, the conveyance of part should not be held to determine the common use of stairs, passages and halls.

² Galloway v. Bonesteel, 65 Wis. 79, 26 N. W. Rep. 262. See Dillman v. Hoffman, 38 Wis. 559.

³ Ford v. Met. Ry. Co.'s, 17 Q. B. D. 12, 27.

the class of rights alluded to in *Wheeldon v. Burrows*.¹ By the grant of part of a tenement it is now well known there will pass to the grantee all these continuous and apparent easements over the other part of the tenement, which are necessary to the enjoyment of the part granted and have been hitherto used therewith. It was said that this mode of access was a way of necessity. That appears to me to be an imperfect statement of its character. A right of way of necessity is a right which arises by implication, but its true nature, and the distinction which obtain between the present right of access claimed and a right of way of necessity is explained in *Parsons v. Spencer*.²

265. An exception has been engrafted on the general rule in the case of a formed or inclosed road made over an alleged servient tenement to and for the apparent use of the dominant tenement.³

Where a house was sold to one who had notice that the adjoining land was to be laid out in building in a manner which made a right of way through an archway under the house necessary to the vendor, and the way through the archway was paved, it was held that the right of way was reserved by implication. "In my opinion," said Lord Romilly, Master of the Rolls, "when a man buys a house in a street or road, with an archway occupying the position of thirteen feet of the ground floor, with a direct paved road under it, and an interrupted foot pavement on each side, being all the marks of a road leading to mews, he is put on inquiry as to what other means

¹ 12 Ch. D. 31.

² 3 B. & S. 761, 767.

There are several American cases showing this tendency. See in particular *Pennsylvania R. Co. v. Jones*, 50 Pa. St. 417; *Rightsell v. Hale*, 90 Tenn. 556, 18 S. W. Rep. 245.

³ *Langley v. Hammond*, L. R. 3 Ex. 161; *Watts v. Kelson*, L. R. 6 Ch. 166; *Thomas v. Owen*, 20 Q. B. D. 225; *Brown v. Alabaster*, 37 Ch. D. 490, where the way was inclosed; *Ford v. Metropolitan Ry. Co.*, 17 Q. B. D. 12; *Wheeldon v. Burrows*, 12 Ch. D. 31, 48; *Bayley v. Great Western R. Co.*, 26 Ch. D. 434, 453; *Roe v. Siddons*, 22 Q. B. D. 224, 235; *Barkshire v. Grubb*, 18 Ch. D. 616; *Phillips v. Phillips*, 48 Pa.

St. 178, 186, 86 Am. Dec. 577; *McCarty v. Kitchenman*, 47 Pa. St. 239; *Kiefer v. Imhoff*, 26 Pa. St. 438; *Pennsylvania R. Co. v. Jones*, 50 Pa. St. 417; *Overdeer v. Updegraff*, 69 Pa. St. 110; *Cannon v. Boyd*, 73 Pa. St. 179. This exception is by no means generally adopted. In *Stevens v. Orr*, 69 Me. 323, it is expressly stated that the right of way would not be implied, except as a way of necessity, although "apparent upon the face of the earth." See also *Oliver v. Hook*, 47 Md. 301; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564, 572; *Fetters v. Humphreys*, 18 N. J. Eq. 260, 19 N. J. Eq. 471; *Cleris v. Tieman*, 15 La. Ann. 316.

of access there are to the mews; and if the whole space behind is vacant, and unbuilt upon, he is put on inquiry to ascertain whether the plan for laying out the ground will give any other means of access to the mews except through and under this archway.”¹

¹ *Davies v. Sear*, L. R. 7 Eq. 427, 433. In *Larsen v. Peterson*, 53 N. J. Eq. 88, 95, 30 Atl. Rep. 1094, Pitney, V. C., said: “I stop here to say that the distinction between a watercourse and a formed and metaled road, constructed for permanent use is quite thin, and there have been expressions of judges

in modern times intimating an inclination to hold that where a dwelling or other such tenement is conveyed with an artificially formed road, leading to it over other lands of the grantor, which are reserved, a right of way ought to be held to pass.”

CHAPTER VII.

WAYS BY PRESCRIPTION.

I. How established, 266-281.	III. Extent of Right acquired, 290-
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I. *How established.*

266. A right of way by prescription may be established in either of two different ways; 1, by use with knowledge on the part of the owner, whose land is used that the person using his land claims a right to use it; 2, by a use so open and notorious that knowledge of a claim of right will be presumed. Evidence in negation of either or both of these ways is competent. Evidence disproving actual knowledge of any claim of right compels the claimant to rely upon a use of the land so visible, open and notorious that the law would presume a knowledge of his claim to use it as a matter of right.

If the party upon whose land a way is claimed has actual knowledge of the claim, much less evidence is necessary to establish a right by use than when it appears that he did not have actual knowledge of such a claim.¹ "To create the presumption of a grant of the right of way, the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant, or that it was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it, without regard to the wishes of the owners of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege, revocable at the pleasure of the owners of the soil."²

267. A right of way may be acquired by prescription, if the use has been adverse, open, notorious and continuous for the whole period required to establish a title to land by adverse posses-

¹ Veeder v. Relyea, 24 N. Y. S. 188. ² Dexter v. Tree, 117 Ill. 532, 541, 6
See as to easements by prescription in N. E. Rep. 506, per Shope, J.
general, §§ 158-203.

sion.¹ This right is founded upon the presumption of a grant. At common law, such a presumption could not be indulged except in the case the right had been used “for a time whereof the memory of man runneth not to the contrary.” “It was sufficient to defeat a claim for such an easement that there was a time when the exercise or enjoyment of the same did not exist. No presumption of a lost grant of a right of way, or other easement, would be tolerated at common law, so long as a time could be shown when such easement was not in use. In subsequent times, however, and especially in this country, the law has been much changed, and the length of time within which such right may be established has been much shortened. In Massachusetts and other States, by repeated decisions the time has been held to be twenty years in analogy to the statute limiting an entry into lands.”²

Where the right to use a farm crossing of a railroad, acquired by reservation in the conveyance of the right of way terminated with the death of the grantor, a prescriptive right to continue such use cannot be acquired in less than twenty years.³

268. The acquisition of rights of way by prescription is regulated by statute in several States. In some States the acquisition of such rights may be prevented by notice to the person who is adversely using the privilege.

In Connecticut,⁴ no person shall acquire a right of way, nor any other easement, from, in, upon or over the land of another by the adverse use or enjoyment thereof, unless such use has been continued uninterrupted for fifteen years. The owner of land over which such way or easement is claimed or used may give notice in writing to the person claiming or using the privilege, of his intention to dispute such right of way or other easement, and to prevent the other party from acquiring such right, and such notice being served and recorded, as provided in the two succeeding sections, shall be deemed an interruption of such use and shall prevent the acquiring of a right thereto by the continuance of the use for any length of time hereafter.

In Georgia,⁵ the right of private way over another's land may arise from express grant, or from prescription by seven years' unin-

¹ See §§ 164-178.

³ *Claffin v. Boston & A. R. Co.*, 157

² *Johnson v. Lewis*, 47 Ark. 66, 2 S. Mass. 489, 32 N. E. Rep. 659.

⁴ G. S. 1888, §§ 1390, 1391.

⁵ Code, 1882, §§ 731, 2235.

interrupted use through improved lands, or twenty years' use over wild lands, or by implication of law, when such right is necessary to the enjoyment of lands granted by the same owner, or by compulsory purchase and sale through the ordinary.

When a person has laid out a private way, and has been in the use and enjoyment of it as much as seven years, of which the owners have had six months' knowledge, without moving for damages, his right to use becomes complete, and such owners are barred of damages.

In Indiana,¹ a right of way or other easement shall not be acquired by adverse use, unless such use shall have been continued uninterruptedly for twenty years. The owner of the land or his agent or guardian may give notice to the claimant of such right that he will dispute the same.

In Iowa,² no right of footway, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time. When any person is in the use of a way, or other easement or privilege, in the land of another, the owner of the land in such case may give notice in writing to the person claiming or using the way, easement or privilege, of his intention to dispute any right arising from such claim or use, and such notice, served and recorded as provided, shall be deemed an interruption of such use, and prevent the acquiring of any right thereto by the continuance of such use for any length of time thereafter.

In Maine,³ no person shall acquire a right of way, or other easement from, in, upon or over the land of another, by the adverse use and enjoyment thereof, unless it is continued uninterruptedly for twenty years; and the owner of such land, to prevent such right, may give notice in writing, to the person claiming it, of his intention to contest such right or easement, which, being served and recorded as hereinafter stated, shall be deemed an interruption of such use, and prevent the acquisition of a right thereto.

In Massachusetts,⁴ no person shall acquire by adverse use or enjoyment, a right or privilege of way or other easement from, in, upon

¹ Annot. Stats. 1894, §§ 5746, 5747. And see *Conner v. Woodfill*, 126 Ind. 85, 25 N. E. Rep. 876; *Parish v. Kaspare*, 109 Ind. 586, 10 N. E. Rep. 109; *McCardle v. Barricklow*, 68 Ind. 356.

² Annot. Code, 1888, §§ 3208, 3209. As

to what constitutes an easement within this statute, see *Churchill v. Burlington Water Co.* (Iowa) 62 N. W. Rep. 646.

³ R. S. 1883, ch. 105, § 13.

⁴ P. S. 1882, ch. 122, §§ 2, 3, 4.

or over the land of another, unless such use or enjoyment is continued uninterrupted for twenty years.

When a person apprehends that a right of way or other easement in or over his land may be acquired by custom, use or otherwise, by any person or class of persons, he may give public notice of his intention to prevent any person from acquiring such easement, by causing a copy of such notice to be posted in some conspicuous place upon the premises for six successive days, and the posting of such copy shall prevent the acquiring of such easement by use for any length of time thereafter; or he may prevent a particular person or persons from acquiring such easement by causing a copy of such a notice to be served upon him or them in the manner provided by law for the service of an original summons in a civil action. A notice so given shall be deemed to be so far a disturbance of the easement to which it relates as to enable the party claiming such easement to bring an action of tort for such disturbance for the purpose of trying the right.

In Pennsylvania,¹ no right of way shall be acquired by user, where such way passes through uninclosed woodland; but on clearing such woodland, the owner shall be at liberty to inclose the same, as if no such way had been used through the same. Under this act a prescriptive right by continuous use for twenty-one years of a way over arable land does not draw with it a right of way over the uninclosed woodland belonging to the owner of the arable land and adjoining such land.²

In Rhode Island³ no right of footway, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time. Prescriptive rights in any way, easement or privilege may be prevented by notice in writing, duly served and recorded.

269. An easement of way cannot be acquired by prescription unless the use was adverse under claim of right, and with the knowledge of the owner of the servient estate.⁴ But it is not essential

¹ 2 Brightley's Purdon's Dig., p. 2083, being act of April 25, 1850, § 20.

² Kurtz v. Hoke, 172 Pa. St. 165, 33 Atl. Rep. 549, 37 W. N. C. 369. The act was not retroactive. Okeson v. Patterson, 29 Pa. St. 22; Fisher v. Farley, 23 Pa. St. 501. The law was

otherwise before the act. Reimer v. Stuber, 20 Pa. St. 458, 59 Am. Dec. 744.

³ G. L. 1896, ch. 205, §§ 5, 6.

⁴ See § 164.

Illinois: Dexter v. Tree, 117 Ill. 532, 6 N. E. Rep. 506; Chicago v. Chicago,

that such owner should have actual knowledge of the adverse user. If such user has been for the requisite time open, notorious, visible, uninterrupted and undisputed under claim of right adverse to such owner, he is charged with knowledge of such user and his acquiescence in it is implied.¹ "It is true that it is said in some of the text-books and decided cases, that to constitute an easement by prescription, the user must have been for the requisite time 'with the knowledge and acquiescence' of the owner of the servient tenement. But I apprehend all that is meant by the phrase quoted is that the user must have been not clandestine or by stealth, but open, notorious, visible and undisputed; and when such a user is under claim of right, adverse, the owner of the servient tenement is charged with notice thereof, and his acquiescence is implied. I have been able to find no case which holds that in the case of such user the easement can be defeated by mere proof that the owner of the servient tenement did not have knowledge of the user."² If the user of the way has been adverse continuously and uninterruptedly under such circumstances that the knowledge and acquiescence of the owner of the land is implied, it is not necessary that the right to the way

R. I. & P. R. Co., 152 Ill. 561, 38 N. E. Rep. 768.

Indiana: Davis v. Cleveland, C., C. & St. L. R. Co., 140 Ind. 468, 39 N. E. Rep. 495; McCardle v. Barricklow, 68 Ind. 356; Hill v. Hagaman, 84 Ind. 287; Parish v. Kaspere, 109 Ind. 586, 10 N. E. Rep. 109; Nowlin v. Whipple, 120 Ind. 596, 22 N. E. Rep. 669; Palmer v. Wright, 58 Ind. 486; Peterson v. McCullough, 50 Ind. 35; Fankboner v. Corder, 127 Ind. 164, 26 N. E. Rep. 766; Harding v. Cowgar, 127 Ind. 245, 26 N. E. Rep. 799; Bales v. Pidgeon, 129 Ind. 548, 29 N. E. Rep. 34.

Kentucky: Hall v. McLeod, 2 Met. 98, 74 Am. Dec. 400; Gayetty v. Bethune, 14 Mass. 49, 7 Am. Dec. 188; Conyers v. Scott, 94 Ky. 123, 21 S. W. Rep. 530.

Maryland: Cox v. Forrest, 60 Md. 74.

Massachusetts: Blake v. Everett, 1 Allen, 248; McCreary v. Boston & M. R. Co., 153 Mass. 300, 11 L. R. A. 359; Coolidge v. Learned, 8 Pick. 504.

New York: Parker v. Foote, 19 Wend.

309; Curtis v. Keesler, 14 Barb. 511; Iselin v. Starin, 71 Hun, 164, 54 N. Y. St. 357, 24 N. Y. Supp. 748.

North Carolina: Mebane v. Patrick, 1 Jones, 23; Smith v. Bennett, 1 Jones, 372; Ingraham v. Hough, 1 Jones, 39.

Pennsylvania: Bennett v. Biddle, 150 Pa. St. 420, 24 Atl. Rep. 738, 140 Pa. St. 396, 21 Atl. Rep. 363; Okeson v. Patterson, 29 Pa. St. 22; Garrett v. Jackson, 20 Pa. St. 331.

Vermont: Clark v. Paquette, 66 Vt. 386, 29 Atl. Rep. 370; Tracy v. Ather-ton, 36 Vt. 503.

Virginia: Smith v. Upper Appomattox Co., 3 Leigh, 318.

¹ Ward v. Warren, 82 N. Y. 265, aff'g 15 Hun, 600; Bushey v. Santiff, 86 Hun, 384, 67 N. Y. St. 187, 33 N. Y. Supp. 473; Nicholls v. Wentworth, 100 N. Y. 455, 3 N. E. Rep. 482; Hammond v. Zehner, 21 N. Y. 118; Colburn v. Marsh, 68 Hun, 269.

² Ward v. Warren, 82 N. Y. 265, 268, per Earl, J.

should have been claimed in words, or that the owner of the land should have admitted in words that he knew of the adverse use and claim of right.¹

270. A right by prescription to pass through a way or alley, belonging to the owner of adjacent property and kept open for the owner's own use, or the use of his tenants is not acquired by one who merely passes through it, and has continued to do so for many years, without doing any adverse act, such as making repairs or giving the owner any notice of a claim to pass over the alley as a matter of right, as distinguished from a mere license or permission of the owner.² The use of a private way without a claim of right does not form the basis of a prescriptive right of way.³

271. A way may be established by prescription without direct evidence of its actual use during each year. A use may be continuous though not constant. "A right of way means a right to pass over another's land, more or less frequently, according to the nature of the use to be made of the easement; and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. It must appear not to have been interrupted by the owner of the land across which the right is exercised, nor voluntarily abandoned by the claimant. Mere intermission is not interruption." ⁴

An occasional use of a way for some purposes, or on some extraordinary occasion is not a sufficient ground for establishing a way by

¹ Blake v. Everett, 1 Allen, 248, per Chapman, J.

² Cook v. Gammon, 93 Ga. 298, 20 S. E. Rep. 332; Aaron v. Gunnels, 68 Ga. 528; Harper v. Advent Parish, 7 Allen, 478; Kilburn v. Adams, 7 Met. 33, 39 Am. Dec. 754; Day v. Allender, 22 Md. 511; Wood v. Reed, 30 N. Y. Supp. 112; Speir v. New Utrecht, 49 Hun, 294, 2 N. Y. Supp. 426; Clark v. Paquette, 66 Vt. 386, 29 Atl. Rep. 370.

³ Drda v. Schmidt, 47 Ill. App. 267; Dexter v. Tree, 117 Ill. 532, 6 N. E. Rep. 506; Quincy v. Jones, 76 Ill. 231.

⁴ Bodfish v. Bodfish, 105 Mass. 317, 319, per Ames, J. In Hollins v. Verney, 11 Q. B. D. 715, Lord Coleridge regarded it as settled in Parker v. Mitch-

ell, 11 A. & E. 788, that there must be proved actual user at least during the last year of the period of prescription, and it had been settled in Bailey v. Appleyard, 8 A. & E. 161, that there must be actual user at least in the first year of the period. Parke, B. expressed an opinion that proof of some user every year was essential. On appeal of Hollins v. Verney, 13 Q. B. D. 304, 313, Lindley, L. J., said: "There is no decision that goes this length; and we are not prepared to say that the actual enjoyment for the full period required by the statute may not be inferred although there is no proof of actual user in every year."

See §§ 179, 180.

prescription.¹ A use is not continuous when there is an interval of five years between the occasions of using it.²

A right of way cannot be acquired by prescription, when the use of it has been at long intervals, and in fact upon only two occasions in twenty years. Thus, where it appeared that the way had only been used by the party claiming it for the removal of wood upon adjoining land, and the wood was cut at intervals of several years, the last cutting having been in the year in which the action was commenced, the one next previous twelve years before, and the next at an interval of twelve years, it was held that there had not been an uninterrupted enjoyment of the way for twenty years, within the meaning of the statute of limitations, which does not apply to so discontinuous an easement.³

272. It is not necessary that the party claiming a right of way by prescription should be the only one entitled to enjoy it, provided he exercises the right under a claim of right independently of others.⁴ The fact that the owner of the servient estate used the same way does not operate to defeat a claim to the way by adverse use.⁵

The owner of woodland had used a road through it to reach the public road for fifty years, and one claiming an easement in the road had used it for twenty years, during which time he had kept it up as his right of way. During the whole time of its use the road had been in substantially the same place and had a well-defined bed, and any change therein had been such as resulted from the fall of a tree across it, or other similar obstructions. It was held that the road was used by the claimant as a matter of right and not of permission, and that he had a right to its continued use.⁶

¹ Esling v. Williams, 10 Pa. St. 126.

² Watt v. Trapp, 2 Rich. 136.

³ Hollins v. Verney, 11 Q. B. D. 715, aff'd 13 Q. B. D. 304, 10 Eng. Rul. Cas. 80. See §§ 187-199.

⁴ McKenzie v. Elliott, 134 Ill. 156, 24 N. E. Rep. 965; Drda v. Schmidt, 47 Ill. App. 267, 271.

⁵ Bennett v. Biddle, 150 Pa. St. 420, 24 Atl. Rep. 738, 140 Pa. St. 396, 21 Atl. Rep. 363; Wanger v. Hipple (Pa.) 13 Atl. Rep. 81; Carmody v. Mulrooney, 87 Wis. 552, 58 N. W. Rep. 1109.

⁶ Hansford v. Berry, 95 Ky. 56, 23 S. W. Rep. 665. Bennett, C. J., delivering the opinion, said: "These facts clearly create the presumption that the passway was used as a matter of right, and, having been so used for fifteen years and more, the claimant's right to its continued use is established. If it be a fact that the owner wants to clear his ground and fence it up, there is nothing in this opinion that precludes him from applying to the county court to discontinue the right of way established in this case, and have

The acts of strangers in the use of a way cannot in any way qualify a right claimed by prescription. Thus a right of way claimed by prescription in a particular course, is not disproved by evidence that strangers were accustomed to cross the land in different courses.¹

273. The fact that certain persons have a right of way by grant does not prevent other persons from acquiring a prescriptive right to the use of the way, although the use by the latter is of the same character as that of the former.² “Different persons may have a right of way over the same place by different titles, one by grant, another by prescription, and a third by custom; and each must plead his own title, and if he proves it, it is sufficient, although he may also prove a title in another, provided the titles are distinct and not inconsistent.”³ The party claiming the right must show that he has acquired it by his own use independent of others; he cannot make his right depend in any degree upon the enjoyment of a similar right by others.⁴

A corporation, authorized to hold land for the purposes of a canal, purchased land by deed of warranty, constructed the canal across it, and laid out a road on the bank of the canal in the same general direction, although not entirely coinciding with an old way, by which the grantor, who owned an adjacent estate, and other persons, had been accustomed to pass over the land granted. The road along the bank of the canal was made much wider than was necessary for a tow-path, and was graded and leveled so as to make it fit for all the kinds of travel which used to pass over the old road. The corporation also built a bridge over their canal, so as to preserve the connection of said road with a public highway; and the new road continued for forty years, without interference or objection of the corporation, to be used as the old one had been. It was held that if the road was not dedicated to the public, which it seems it was, the owner of the adjacent estate had such a right of way by adverse use and possession as raised a presumption of grant from the corporation, which it and those claiming under it could not now disturb.⁵

another right of way opened for the benefit of the claimant of the way, in which case the court will take into consideration the equities of all the parties, and act accordingly.”

¹Smith v. Lee, 14 Gray, 473, 478.

²Ballard v. Demmon, 156 Mass. 449,

31 N. E. Rep. 635, per Field, C. J.; Webster v. Lowell, 142 Mass. 324, 334, 8 N. E. Rep. 54.

³Kent v. Waite, 10 Pick. 138, 142.

⁴Cox v. Forrest, 60 Md. 74; Dodge v. Stacy, 39 Vt. 558.

⁵Curtis v. Angier, 4 Gray, 547.

274. Proof of the use of a way in common with the public does not establish a right of way in favor of an individual claimant. Such a use may establish a right in the public, but does not establish a right of private way in the claimant.¹

Several persons, as already shown, may have a right to the same way, but the idea of a private right is, that it belongs to some persons to the exclusion of others. If the whole community have an equal right, then the right is in the public, and the remedy for an interference with it is by indictment, and an individual is without remedy unless he can show that the obstruction has occasioned a special and peculiar injury to him not common to the public.²

A private way by prescription over land formerly a public highway, which has been abandoned, and the land fenced up, can be acquired only by a user that was adverse, and the user could not be adverse while the highway was open to public use; and therefore a private right can be established only by an adverse user for the requisite time after the highway had been abandoned and closed up.³

275. Where a right of way, claimed by prescription, is sought to be supported by evidence of a beaten, visible path, this evidence may be explained by proof that other people besides the claimant of the right were in the habit of crossing the close, not uniformly, but generally, in the same path.⁴ A way regularly formed, or graveled and fitted for use as a way, from the claimant's own estate to a highway across land attached to a public building, indicating a use by the claimant distinct from any use by the proprietors of the land, is some evidence of an exclusive use by him, under a claim of right.⁵

Evidence that for more than twenty years there has been a well-defined traveled way, with ruts visible in some parts, though not so worn by travel as to prevent the growth of grass, leading from the gate of a house lot across a meeting-house green to the highway, with no other ready and convenient access to the house, is sufficient evidence of a way by prescription to be submitted to a jury.⁶ "But the fact that a particular track or path was a little more worn and marked by travel than the general surface of the lot, or that the adjacent proprietor had occasionally leveled a spot gullied by the

¹ Day v. Allender, 22 Md. 511, 529.

R. Co., 67 Ga. 761; Wheeler v. Clark,

² See chapter XII; Price v. Wilbourn, 1 Rich. 58; Barker v. Clark, 4 N. H. 380, 17 Am. Dec. 428.

58 N. Y. 267.

⁴ Pope v. Devereux, 5 Gray, 409.

³ Black v. O'Hara, 54 Conn. 17, 5 Atl. Rep. 598; Glaze v. Western & Atl.

⁵ Kilburn v. Adams, 7 Met. 33, 39 Am. Dec. 754.

⁶ Baker v. Crosby, 9 Gray, 421.

rain, could scarcely be regarded, independently of other proof, as indicative of a claim of right.”¹

276. Title to a way by prescription is established by proof that the party claiming the way repaired it often and made continuous use of it for the requisite time. If the owner of the dominant estate during such time has expended money in improving the way, and the owner of the servient estate has marked its boundaries and fenced it, these acts show knowledge of the use and acquiescence in it²

Where one having a private way from his house to the highway, allowed his brother-in-law, who owned adjoining land, to use the way with him for twenty years and more, and both worked in building and repairing the way, neither saying anything to the other as to the right of the brother-in-law to use it, it was held that these facts afforded a presumption of a claim of right, such as would establish a prescription.³

277. A way established on the division line between two adjacent owners may become a way by prescription through the use of it by each during the requisite period.⁴ Chief Justice Shaw, delivering the opinion in such case, said: “The use of the common way by each, so far as it was used in and over the soil of the other, was adverse, uninterrupted and used under a claim of right and continued more than twenty years, and thereby each acquired such an easement in that portion of the land of the other which was covered by the way as the other could not lawfully disturb. * * * When such actual uninterrupted use of a way, as of right, is shown to have existed a sufficient length of time to create the presumption of a grant, if the other party relies on the fact that these acts, all or some of them, are permissive, it is incumbent on such party by sufficient proof to rebut such presumption of a non-appearing grant, otherwise the presumption stands as sufficient proof and establishes the right.”⁵

Where an alley is laid out by adjacent owners, half of its width on the land of each, and is used by both of them for a length of

¹ Kilburn v. Adams, 7 Met. 33, 39, 39 Am. Dec. 754, per Shaw, C. J., citing First Parish in Gloucester v. Beach, 2 Pick. 60, note.

² Fankboner v. Corder, 127 Ind. 164, 26 N. E. Rep. 766.

³ Carmody v. Mulrooney, 87 Wis. 552, 58 N. W. Rep. 1109.

⁴ Barnes v. Haynes, 13 Gray, 188; Nicholls v. Wentworth, 100 N. Y. 455, 461, 3 N. E. Rep. 482; Townsend v. Bissell, 4 Hun, 297.

⁵ Barnes v. Haynes, 13 Gray, 188, 192, 74 Am. Dec. 629.

time beyond the period of prescription, the use of it under a claim of right to the mutual use of the whole alley, is essentially adverse to a separate and exclusive right to a part of it by either of the owners.¹

If a way be established by adjoining owners along the division line of their land, each contributing an equal portion of land for the purpose as a lane or way for cattle, but it is afterwards used by both proprietors, as a general way for all purposes, for a period sufficient to give a right by prescription, neither owner can close up the way or the part of it taken from his own land, as against the other.²

278. One having a right of way by grant or reservation for certain purposes, may acquire an easement by prescription over the same route for other purposes. But if one has enjoyed a right of way for a period long enough to give a prescriptive title, yet if the use he has made of it has been consistent with the deed granting or reserving the right, the easement must have been deemed to have been under the deed, and not adverse to the grant or reservation, and must be explained and limited by the deed. An easement by grant or reservation may be enlarged by prescription. Thus, if a way granted or reserved for foot passengers and for particular purposes, has been used long enough to give a title by prescription as a carriage-way, a right by prescription to use it as a carriage-way would be established, notwithstanding the origin of the way.³

279. A way cannot be acquired by prescriptive right if a gate across the way is kept locked and the owner of the land keeps the key.⁴

An interruption of the use of the way by the erection of gates or bars, or by ploughing up the way, or by the use of any means which prevent the enjoyment of it, rebuts the presumption of a grant and the acquisition of a way by prescription.⁵ The burden is upon the party claiming the easement, notwithstanding the interruption by the owner to show that such interruption was consistent with the claim of a right of way.⁶

¹ Clark v. Henckel (Md.), 26 Atl. Rep. 1039.

² Thompson v. Easley, 87 Ga. 320, 13 S. E. Rep. 511.

³ Atkins v. Bordman, 20 Pick. 291.

⁴ Luecken v. Wuest, 31 Ill. App. 506;

Bushey v. Santiff, 86 Hun, 384, 67 N. Y. St. 187, 33 N. Y. Supp. 473.

⁵ Willey v. Norfolk So. R. Co., 96 N. C. 408, 1 S. E. Rep. 446; Barker v. Clark, 4 N. H. 380, 17 Am. Dec. 423.

See Weld v. Brooks, 152 Mass. 297.

Plimpton v. Converse, 42 Vt. 712.

280. A private right of way by prescription can be acquired over the location of a railroad notwithstanding a statute imposing a penalty on any person who, without right, knowingly stands, or walks, or rides, or drives a horse on a railroad.¹ “The right to maintain a private crossing is also one which the railroad might grant, and to which it could give consent. The acts done in assertion of such a right, or by virtue of such an alleged consent, are not to be treated as originally wrongful, when they have been continued over twenty years, and when the party affected thereby has acquiesced for that length of time.”²

One who has used in connection with his land a crossing over a railroad track for a period sufficient to give him title by prescription has an easement appurtenant to his land, and may maintain an action for its obstruction, regardless of its value.³

A public footway may also be acquired across a railroad track by prescription.⁴ The fact that at the outset there existed merely a private farm crossing where the public footway is claimed, and that this crossing was established by agreement for the convenience of the owner of the land through which the railroad was built, is not decisive to show that such crossing might not, in the course of time, become a public way by prescription.⁵

One cannot gain a prescriptive right in land of which he holds the title and rightfully the possession, though another be in actual possession. The possession is legally referred to the owner of the title, and such owner cannot have adverse possession as against the party in wrongful possession; but the possession of the owner is consistent with his rights. Accordingly a right of way by prescription cannot be acquired over a railroad, whose location runs through the land of the person claiming such right, while the railroad corporation neglects

¹ *Turner v. Fitchburg R. Co.*, 145 Mass. 433, 14 N. E. Rep. 627. And see *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325, 11 N. E. Rep. 105; *Wright v. Boston & A. R. Co.*, 142 Mass. 296, 299, 7 N. E. Rep. 866; *Gay v. Boston & A. R. Co.*, 141 Mass. 407, 6 N. E. Rep. 236; *Fitchburg R. Co. v. Frost*, 147 Mass. 118, 121, 16 N. E. Rep. 773; *Fitchburg R. Co. v. Page*, 131 Mass. 391; *McCreary v. Boston & M. R. Co.*, 153 Mass. 300, 11 L. R. A. 359.

² *Turner v. Fitchburg R. Co.*, 145 Mass. 433, 14 N. E. Rep. 627, per Devens, J.

³ *Hardy v. Ala. & V. Ry. Co.*, 73 Miss. 719, 19 So. Rep. 661.

⁴ *Fitchburg R. Co. v. Page*, 131 Mass. 391; *McCreary v. Boston & M. R. Co.*, 153 Mass. 300, 26 N. E. Rep. 864, 11 L. R. A. 359.

⁵ *McCreary v. Boston & M. R. Co.*, 153 Mass. 300, 26 N. E. Rep. 864, 11 L. R. A. 359; *Weld v. Brooks*, 152 Mass. 297; *Sprow v. Boston & A. R. Co.*, 163 Mass. 330.

to comply with a decree of the county commissioners, made upon the petition of such landowner, that the corporation give security for the payment of damages for the land taken, and no payment or settlement of such damages is made.¹

281. A prescriptive right to a passage-way along the track or right of way of a railroad cannot be acquired by the public, or by individuals while the railroad company has constantly used a single track over such right of way. The construction and operation of one track upon its location is an assertion of right to the entire width of its right of way. The presence of a track constantly in use is a defiant badge of ownership, and the only practical assertion of title that can be made. If the public has used paths by the side of the railroad track for any length of time, the use must be considered as permissive and not adverse. An injunction will be issued in behalf of the railroad company to restrain any interference with the laying of a second track over such part of its way as has been used by the public as a footway for more than twenty-one years.²

II. *When the Use is Permissive Only.*

282. If the use of a way over one's land be shown to be permissive only, no right to use it is conferred, though the use may have continued for a century, or any length of time.³ "A different doctrine would have a tendency to destroy all neighborhood accommodation in the way of travel; for if it were once understood that a

¹ *Smith v. New York & N. E. R. Co.*, 142 Mass. 21, 6 N. E. Rep. 842.

² *Pennsylvania R. Co. v. Freeport*, 138 Pa. St. 91, 20 Atl. Rep. 940. And see also *Rochdale Canal v. Radcliffe*, 18 Q. B. 287; *Staffordshire & W. Canal Nav. v. Birmingham Canal Nav.*, L. R. 1 Eng. & Irish App. 254; *Sapp v. Northern C. R. Co.*, 51 Md. 115.

³ *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400; *Conyers v. Scott*, 94 Ky. 123, 21 S. W. Rep. 530; *Dexter v. Tree*, 117 Ill. 532, 6 N. E. Rep. 506; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Kuhlman v. Hecht*, 77 Ill. 570; *Thomas v. England*, 71 Cal. 456, 12 Pac. Rep. 491; *McCreary v. Boston & M. R. Co.*, 153 Mass. 300, 26 N. E.

Rep. 864, 11 L. R. A. 359; *Pennsylvania R. Co. v. Hulse* (N. J. L.), 35 Atl. Rep. 790; *Hill v. Hagaman*, 84 Ind. 287; *Nowlin v. Whipple*, 120 Ind. 596, 22 N. E. Rep. 669; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. Rep. 484; *Car-gar v. Fee*, 140 Ind. 572, 578, 39 N. E. Rep. 93; *Nelson v. Nelson*, 41 Mo. App. 130; *Clark v. Paquette*, 66 Vt. 386, 29 Atl. Rep. 370; *Flora v. Car-bean*, 38 N. Y. 111; *White v. Spencer*, 14 N. Y. 247; *Burnham v. McQuesten*, 48 N. H. 446; *Ingraham v. Hough*, 1 Jones, 39; *O'Brien's App.*, 11 W. N. C. 229; *Bennett v. Biddle*, 140 Pa. St. 396, 21 Atl. Rep. 363, 150 Pa. St. 420, 24 Atl. Rep. 738; *Okeson v. Patterson*, 29 Pa. St. 22.

man, by allowing his neighbor to pass through his farm without objection over the pass-way which he used himself, would thereby, after the lapse of twenty or thirty years, confer a right on him to require the pass-way to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue. To create the presumption of a grant of the right of way, the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant, or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it, without regard to the wishes of the owner of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege revocable at the pleasure of the owner of the soil.”¹

Where each of two brothers owning adjoining farms, permitted the other to pass over his fields as a matter of mutual accommodation, and after the title of one had passed to a stranger, such travel was continued for more than twenty-one years, but in the spirit of accommodation, the uses of neither party was adverse to the other, and no easement was acquired thereby.²

283. A right of way may be acquired by prescription although the use began under a mere license or verbal consent provided the other requisites of a prescriptive right exists;³ that is, the user must have been exercised under a claim of right for the full prescriptive period, with the knowledge and acquiescence of the owner of the servient estate, under circumstances showing the user to be adverse.

A right of way may be so acquired although the user began in a trespass, provided the possession is continued under a claim of right.⁴

Proof that one has used a private way under a verbal contract or conveyance of the right by the landowner is sufficient to rebut a

¹ Hall v. McLeod, 2 Metc. (Ky.) 98, 101, 74 Am. Dec. 400, per Simpson, C. J.

² Bennett v. Biddle, 140 Pa. St. 396, 21 Atl. Rep. 363, aff'd 150 Pa. St. 420, 24 Atl. Rep. 738.

³ Ashley v. Ashley, 4 Gray, 197; Stearns v. Janes, 12 Allen, 582; McAllister v. Pickup, 84 Iowa, 65, 50 N. W. Rep. 556; State v. Tucker, 36

Iowa, 485; McKenzie v. Elliott, 134 Ill. 156, 24 N. E. Rep. 965; Talbott v. Thorn, 91 Ky. 417, 16 S. W. Rep. 88; Hill v. Hagaman, 84 Ind. 287; Barbour v. Pierce, 42 Cal. 657; Coventon v. Seufert, 23 Oreg. 548, 32 Pac. Rep. 508.

⁴ Sibley v. Ellis, 11 Gray, 417; Lanier v. Booth, 50 Miss. 410, 416

contention that the user was permissive, though the contract is not enforceable as a contract.¹

284. Of course, if one enters as the tenant of another or holds under him by contract in any way, he cannot acquire any prescriptive right while he thus holds; nor will any portion of the time during which he thus holds be counted in making out the prescriptive right.²

If the use of a way was begun under a license to one who afterwards repudiated the license, he can acquire a right by prescription only by use of the way for the period of limitation, after he has repudiated the license, and claimed a right in himself, adverse to the owner of the land, with knowledge of such claim and acquiescence in it by the owner of the land.³

285. The use of a way over uninclosed land connected with a public building is usually to be regarded as permissive, and not adverse. Chief Justice Shaw, with his usual clearness and completeness, states the law applicable in such a case: "The rule we think is, that where a tract of land, attached to a public building, such as a meeting-house, town house, school house, and the like, and occupied with such house, is designedly left open, and uninclosed for convenience or ornament, the passage of persons over it, in common with those for whose use it is appropriated, is, in general, to be regarded as permissive, and under an implied license, and not adverse. Such a use is not inconsistent with the only use which the proprietors think fit to make of it; and, therefore, until they think proper to enclose it, such use is not adverse, and will not preclude them from enclosing it, when other views of the interests of the proprietors render it proper to do so. And though an adjacent proprietor may make such use of the open land more frequently than another, yet the same rule will apply unless there be some decisive act, indicating a separate and exclusive use, under a claim of right. A regularly formed and wrought way across the ground, paved, macadamized, or graveled and fitted for use as a way, from his

¹ Talbott v. Thorn, 91 Ky. 417, 16 S. W. Rep. 734; Gayford v. Moffatt, L. R. W. Rep. 88; Bright v. Dunn (Ky.) 15 4 Ch. 133.
S. W. Rep. 7, 779, 12 Ky. L. Rep. 689, ³ Hill v. Hagaman, 84 Ind. 287, 293;
690. Eckerson v. Crippen, 110 N. Y. 585, 18

² Kuhlman v. Hecht, 77 Ill. 570; N. E. Rep. 443; Thoenke v. Fiedler, O'Brien's App., 11 W. N. Cas. 229; 91 Wis. 386, 390.
Vossen v. Dautel, 116 Mo. 379, 22 S.

own estate to the highway, indicating a use distinct from any use to be made of it by the proprietors, would, in our opinion, be evidence of such exclusive use and claim of right. So would be any plain, unequivocal act, indicating a peculiar and exclusive claim open and ostensible, and distinguishable from that of others. But the fact that a particular track or line was a little more worn and marked by travel than the general surface of the lot, or that the adjacent proprietor had occasionally leveled a spot gullied by the rain, could scarcely be regarded, independently of other proof, as indicative of a claim of right.”¹

The land in front of an academy building was thrown open as a common, and a way over it was used for more than twenty years, by one who made occasional repairs of it for his own convenience. After twenty years of such use the proprietor of the ground built a fence across the way, with a gate, and informed the person using it that it was done to prevent his using the way, in reply to which statement, such person asserted no right of way. It was held that a jury might properly find that such user was permissive and not adverse. “To prove the use to be adverse, it is not sufficient to show an intention alone to claim it as of right, but that intention must be made manifest by acts of clear and unequivocal character that notice to the owner of the claim might reasonably be inferred; and it is very apparent that a user, which in ordinary cases would indicate a claim of right and furnish reasonable evidence of notice to the owner, might wholly fail to furnish such indication where the land was laid in common under such circumstances as to be an implied license to all persons to pass over it.”²

286. The circumstances attending the use of a way over unclosed woodland may determine whether the use was under a claim of right, or merely as a privilege revocable at the pleasure of the owner of the land. That such a way was used merely as a privilege and not as a matter of right, is evident from the fact that the way has been changed in location from time to time as the owner brought different parts of his land under cultivation, and no question was raised by those who used the way as to his right to close the

¹ Kilburn v. Adams, 7 Met. 33, 39, 39 Am. Dec. 754, per Shaw, C. J. See Gloucester First Parish v. Beach, 2 Pick. 60, note; Harper v. Advent Parish, 7 Allen, 478; Burnham v. McQuesten, 78 N. H. 446.

² Burnham v. McQuesten, 48 N. H. 446, 454, per Bellows, J. Following Kilburn v. Adams, 9 Met. 33, 39 Am. Dec. 754.

ways. "The uncleared and uninclosed condition of the land where the passage-way is located; the recognized right of the owner to change and to discontinue at will the different pass-ways over his land, and the customary and free use of pass-ways through appellee's woodland, make it evident no person ever treated or regarded his use of the pass-way in dispute as anything more than a permissive use which the owner might revoke at any time."¹

The generally established rule is that a right of way may be created by prescription over wild woodland, as well as over inclosed land.²

287. In some states a right of way cannot be acquired through uninclosed woodland, unless, in addition to the use of a way, there is some act showing it is claimed by right, such as cutting the wood to clear a road, or working upon it to make it possible, or some act which amounts to a notorious assertion of right.³

This rule as regards ways over uninclosed woodland, has been declared by statute in Pennsylvania;⁴ though previous to the statute the common-law doctrine prevailed. In an early case in which the ruling of the lower court was that the character of the land, which was uninclosed woodland, rebutted the presumption of a grant of a right of way, the Supreme Court reversed this ruling, Kennedy, J., saying: "There seems to be no reason for making any distinction between the legal effect of a person's occupying, for the space of twenty-one years, a way over the clear land of another, which is inclosed by a visible fence, and his clear or woodland that is uninclosed, or inclosed merely by an ideal one. For all are con-

¹ Conyers v. Scott, 94 Ky. 123, 21 S. W. Rep. 530, per Lewis, J. And see O'Daniel v. O'Daniel, 88 Ky. 185, 10 S. W. Rep. 638.

In Bowman v. Wickliffe, 15 B. Mon. 84, 98, it appeared that there were several pass-ways over the owner's woodland; that they were changed from time to time by the owner, and one or the other discontinued as he cleared the land, and new ones opened; and that no one claimed the pass-way as a matter of right, but all claimed it by permission only. Under the circumstances, the court held that there was no presumption of adverse use, although such permission had continued for

many years; that, in order to create a right of way by prescription, it must be shown that it was claimed and used as an adverse right for at least fifteen years, and, as long as it was used permissively, no presumption of adverse use could arise.

² Hansford v. Berry, 95 Ky. 56; Conyers v. Scott, 94 Ky. 123; Talbott v. Thorn, 91 Ky. 417.

³ Watt v. Trapp, 2 Rich. 136; Gibson v. Durham, 3 Rich. 85; Nash v. Peden, 1 Spear, 17; Sims v. Davis, Chev. 1, 34 Am. Dec. 581; Smith v. Kinard, 2 Hill, 642.

⁴ § 268.

sidered as inclosed by the law; and the owner is entitled to be protected in the quiet, exclusive and undisturbed enjoyment of the latter description of land, as much, and to as great an extent as in that of the former. It is, therefore, obvious, that such an occupation of a way over either is equally opposed to the absolute right and dominion of the owner over his land, and can only be lawfully exercised by another, either as a matter of right, under a grant from him, or by leave or favor."¹

288. Use by the public of a private way which the owners maintain privately for their own convenience is permissive, or by license, and lacks the essential characteristics required to work a presumption of grant or title in the public for a public highway.² The mere fact that a farmer leaves a lane open through his farm for his own accommodation and that of his neighbor, does not authorize any inference that it is his intention to dedicate the way to the public, or that those who use the way have any right other than a mere license revocable at any time.³ From the fact that a way is kept open and used by the owner for his own purposes, it may properly be inferred that the use of it by others is with his consent.⁴

The owner of a wheelwright shop kept the yard and grounds about the shop open to the public to pass and repass, in connection with his business. The owner of a grist mill adjoining such yard, claimed a prescriptive right to pass over it by reason of an uninterrupted, open and notorious use for a period sufficient to give a prescriptive right. It was held, however, that such use would be presumed to be with the permission of the owner; and would not be presumed to be adverse to the owner or under a claim of right by the owner of the grist mill. The claimant of a right of way, in such case, in order to establish it must show some act appropriating the way peculiarly to himself, and more clearly indicative of a claim of right than his open and notorious use of the way.⁵

¹ Worrall v. Rhoads, 2 Whart. 427, 30 Am. Dec. 274, followed in Reimer v. Stuber, 20 Pa. St. 458, 59 Am. Dec. 744.

² Speir v. New Utrecht, 49 Hun, 294, 2 N. Y. Supp. 426, 17 N. Y. St. 727; Wood v. Reed, 62 N. Y. St. 23, 30 N. Y. Supp. 112; Harkness v. Woodmansee, 7 Utah, 227, 26 Pac. Rep. 291.

³ Coberly v. Butler, 63 Mo. App. 556;

Stacey v. Miller, 14 Mo. 478; Kansas City C. & S. R. Co. v. Woolard, 60 Mo. App. 631.

⁴ Wood v. Reed, 62 N. Y. St. 23, 30 N. Y. Supp. 112; Harper v. Advent Parish, 7 Allen, 478; Kilburn v. Adams, 7 Met. 33, 39 Am. Dec. 754.

⁵ Plimpton v. Converse, 44 Vt. 158, 42 Vt. 712.

289. In an action to establish a right of way by prescription the question is for the jury whether the use was under a claim of right, or was merely a matter of neighborly accommodation.¹

The burden of proof is on the landowner to show that the use of a way over his land, for the prescriptive period, was by license and not adverse.² If one uses a road over the land of another, without asking leave and without objection, a grant is presumed; but this presumption may be rebutted in subservience to the title of the owner.³

When a right of way has been established by adverse use for the requisite period, the party entitled to it will not be divested of the right by applying for and obtaining a license to use the way from the owner of the servient estate;⁴ or by an offer to buy the privilege;⁵ but evidence of such a license or offer would strongly tend to show that a previous use was not under a claim of right.⁶

Evidence that one claiming a way by prescription had served a written notice upon the owner of the land, in which he claimed that the way was a public road, is admissible to show that he did not at the time of giving the notice claim that it was a private way, which he was using under a claim of right.⁷

An admission of a predecessor in title to the servient estate during his ownership, that he had no right to close a way over it, is competent evidence against a subsequent owner of the estate over which a right of way is claimed.

III. *Extent of the Right Acquired.*

290. A right of way acquired by adverse use without color of title is limited to the land actually occupied. Thus a railroad company, occupying for the statutory period land for a right of way,

¹ *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. Rep. 804; *Thomas v. England*, 71 Cal. 456, 460, 12 Pac. Rep. 491; *Barbour v. Pierce*, 42 Cal. 657; *Putnam v. Bowker*, 11 Cush. 542; *Bennett v. Biddle*, 150 Pa. St. 420, 24 Atl. Rep. 738, 140 Pa. St. 396, 21 Atl. Rep. 363.

² *Tickle v. Brown*, 4 Ad. & El. 369; *Wanger v. Hipple* (Pa.), 13 Atl. Rep. 81, 11 Cent. Rep. 776; *Cox v. Forest*, 60 Md. 74; *School District v. Lynch*, 33 Conn. 330, 334; *Hall v. McLeod*, 2

Metc. (Ky.) 98, 74 Am. Dec. 400; *Bachelder v. Wakefield*, 8 Cush. 243; *Hammond v. Zehner*, 23 Barb. 473; *Garrett v. Jackson*, 20 Pa. St. 331; *Plimpton v. Converse*, 42 Vt. 712, 44 Vt. 158.

³ *Garrett v. Jackson*, 20 Pa. St. 331; *Bennett v. Biddle*, 140 Pa. St. 396, 21 Atl. Rep. 363.

⁴ *Tracy v. Atherton*, 36 Vt. 503.

⁵ *Kana v. Bolton*, 36 N. J. Eq. 21.

⁶ *Tracy v. Atherton*, 36 Vt. 503.

⁷ *Turner v. Williams*, 76 Mo. 617.

without color of title, acquires a right of way of the width it has used and occupied for the full period of limitation. There is no presumption that the company has appropriated for its right of way a strip of the usual width of a hundred feet, or of such width as might be acquired by the statute under eminent domain.¹ But where a railroad company entered upon and occupied land for a right of way, under license by the owner, who had verbally agreed to donate to the company the usual right of way across his land, and the boundary of a right of way was marked by stakes, it was held that possession of the land by the company for the necessary length of time under the statute of limitations gave it a title to a right of way of the customary width of one hundred feet; although it had exercised actual and exclusive possession of only twenty-five feet along the center of the strip.² The parol agreement to convey was considered sufficient to constitute a good color of title.

A prescriptive right of way can only be used as a means of access to the particular land to which it is appurtenant. It cannot be used as a means of access to another parcel adjoining that to which the way was acquired.³

291. A right of way acquired by prescription cannot exceed the user in which it had its origin. "A right of way for one purpose gained by user cannot be turned into a right of way for another purpose, if the latter adds materially to the burden of the servient estate, and the right derived from user can never outrun or exceed the user in which it had its origin. It is also to be recalled that prescription presupposes a grant which conveys a definite right corresponding in all material respects with some equally definite user, which has a distinct and tangible purpose."⁴

A prescriptive right of way to a field for agricultural purposes only can be used for the purpose of getting minerals from such field.⁵

¹ Omaha & R. V. Ry. Co. v. Rickards, 38 Neb. 847, 57 N. W. Rep. 739.

² Hargis v. Kansas City C. & S. R. Co., 100 Mo. 210, 13 S. W. Rep. 680.

³ Howell v. King, 1 Mod. 190; Lawton v. Ward, 1 Ld. Raym. 75; Colchester v. Roberts, 4 M. & W. 769, 774; Ackroyd v. Smith, 10 C. B. 164; Skull v. Glenister, 16 C. B. N. S. 81; Rexford v. Marquis, 7 Lans. 249, 262; Stearns v. Mullen, 4 Gray, 151; Smith v. Porter, 10 Gray, 66; Kripp v. Cur-

tis, 71 Cal. 62, 11 Pac. Rep. 879; French v. Marstin, 24 N. H. 440, 443, 57 Am. Dec. 294, 32 N. H. 316; Shroder v. Brenneman, 23 Pa. St. 348.

⁴ American Bank Note Co. v. New York El. R. Co., 129 N. Y. 252, 266, 29 N. E. Rep. 302, per Finch, J.; Richardson v. Pond, 15 Gray, 387; Ryan v. Mississippi Valley & S. I. R. Co., 62 Miss. 162. See § 200.

⁵ Bradburn v. Morris, 3 Ch.D. 812.

A way by prescription over another's estate, used for the purpose of taking away wood only, cannot be extended to other purposes, when the dominant estate is occupied by dwellings and cultivated.¹ A right of way for agricultural purposes is a limited and qualified right, and does not confer an unlimited right to carry lime, or the produce of a quarry, over it at all times and for all purposes.²

292. A right of way by prescription is limited to the common and ordinary use which was made of it during the period of prescription.³ If one has used a way whenever he desired to, for several purposes, there may be ground for inferring that he has a right of way for all purposes; but it is a question for the jury in each particular case to determine from the facts established as to past user, whether he has a right to use it for all purposes. If the use has been confined to a particular purpose, the jury ought not to extend the right, but if it is proved that he has used it for a variety of purposes, then the jury may be warranted in finding a way for all.⁴

One being entitled by immemorial user to a right of way over another's land from a field called "the nine-acre field," used the way for the purpose of carting from that field some hay stacked there which had been grown partly on that field, and partly on the land adjoining. The jury found, in effect, that the claimant of the right of way had used the way in good faith and for the ordinary and reasonable use of the nine-acre field as a field. It was held that the mere fact that some of the hay had not been grown on the nine-acre field did not make the carrying of it over the way an excess in the user of it.⁵

Proof that a prescriptive right of way was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate, while substantially in the same condition.⁶

The actual exercise of a right of way for more than twenty years

¹ Atwater v. Bodfish, 11 Gray, 150; ⁴ Cowling v. Higginson, 4 M. & W. Parks v. Bishop, 120 Mass. 340, 21 245, 256. Am. Rep. 519.

² Jackson v. Stacey, Holt, N. P. ⁵ Williams v. James, L. R. 2 C. P. 577. Parks v. Bishop, 120 Mass. 340, 21 Am. Rep. 519; Wimbledon & Putney Com-

³ Richardson v. Pond, 15 Gray, 387; ⁶ Atwater v. Bodfish, 11 Gray, 150; Ballard v. Dyson, 1 Taunt. 279. Commons v. Dixon, 1 Ch. D. 362.

for all purposes to which the use or enjoyment of the premises was required at different times, is sufficient *prima facie* proof of a prescriptive right of way for all purposes.¹

293. A right of way by prescription for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm, not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farmhouse and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm, it was held that this did not establish a right of way for carting the materials required for building a number of new houses on the land.² In the case first cited, Baggallay, J. A., said: "Now let us take the case of an agricultural district where there had been a right of way to certain land exercised for agricultural purposes only for a length of time, and then it appears that there is valuable gravel on the estate, and the gravel is raised and sold from time to time, and carried over the way previously used for agricultural purposes alone; if afterwards, other mineral produce is found and raised and the way is used for carrying that away, and then the way is used for a variety of other purposes, that from time to time arise in the course of the occupation of the land, I can understand that if the case went to a jury, with user for all this variety of purposes established, the jury would or might infer that the original grant was a grant for all purposes. No such case arises here."

In the Massachusetts case cited the same rule of law is stated by Gray, C. J., saying: "If the condition and character of the dominant estate are substantially altered — as in the case of a way to carry off wood from wild land, which is afterwards cultivated and built upon, or of a way for agricultural purposes to a farm, which is afterwards turned into a manufactory or divided into building lots — the right of way cannot be used for new purposes, required by the altered condition of the property and imposing a greater burden upon the servient estate."³

¹ Dare v. Heathcote, 25 L. J. Ex. 245. 373; Parks v. Bishop, 120 Mass. 340, 21

² Wimbledon & Putney Commons Am. Rep. 519.

Conservators v. Dixon, 1 Ch. D. 362, ³ Parks v. Bishop, 120 Mass. 340, 21 Am. Rep. 519.

Evidence of a prescriptive right of way for all manner of carriages does not necessarily prove a right of way for all manner of cattle.¹

294. A right of way by prescription must be definite in its location. One cannot maintain such a right by showing that he was in the habit of crossing another's land, but not by any definite way or any particular route or line.² The adverse enjoyment of the way must be in the same place within definite lines for the whole period of limitation, and not spread out over open ground in many divergent tracks.³

295. A prescriptive right of way cannot be acquired by tacking together two distinct periods of use of two separate ways, though one was abandoned for the other with the consent of the landowner, and the two periods together would amount to the prescriptive time requisite to give a prescriptive right of way. It is essential that the use should relate strictly to the identical way over which the right is claimed.⁴

A way imports a right of passing in a particular line and not everywhere over the land upon which the right may be claimed.⁵

That a road has been traveled over an open prairie for forty years in a general direction, but on a varying line, which had been changed within twenty years, is not sufficient to show a road by user

¹ *Ballard v. Dyson*, 1 Taunt. 279, 285. "The usage then in this case is evidence of a very different grant from that which is claimed, namely, to drive fat oxen, animals dangerous in their nature, and which there might be very good reason to except out of a grant of a way through a closely inhabited neighborhood." Per Heath, J.

² *Jones v. Percival*, 5 Pick. 485, 16 Am. Dec. 415; *Bushey v. Santiff*, 86 Hun, 384, 33 N. Y. Supp. 473; *Holmes v. Seely*, 19 Wend. 507, 511; *Johnson v. Lewis*, 47 Ark. 66, 14 S. W. Rep. 466; *Short v. Walton*, 61 Ga. 28; *Aaron v. Gunnels*, 68 Ga. 528; *Russell v. Napier*, 82 Ga. 770, 9 S. E. Rep. 746; *Golding v. Williams*, *Dudley* (S. C.) 92.

³ *Clark v. Paquette*, 66 Vt. 386, 29 Atl. Rep. 370; *Plimpton v. Converse*, 44 Vt. 158; *Garnett v. Slater*, 56 Mo. App. 207; *Kurtz v. Hoke*, 172 Pa. St.

165, 33 Atl. Rep. 549; *Brake v. Crider*, 107 Pa. St. 210; *Arnold v. Cornman*, 50 Pa. St. 361; *Owens v. Crossett*, 105 Ill. 354; *Bryan v. East St. Louis*, 12 Ill. App. 390; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489, 5 Atl. Rep. 641.

⁴ *Peters v. Little*, 95 Ga. 151, 22 S. E. Rep. 44; *Follendore v. Thomas*, 93 Ga. 300, 20 S. E. Rep. 329; *Pope v. Devereux*, 5 Gray, 409.

⁵ *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. Rep. 770, per Morton, J.; *Chase v. Perry*, 132 Mass. 582; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Jones v. Percival*, 5 Pick. 485, 16 Am. Dec. 415; *Short v. Walton*, 61 Ga. 28; *Aaron v. Gunnels*, 68 Ga. 528; *Johnson v. Lewis*, 47 Ark. 66, 14 S. W. Rep. 466; *Rogers v. Duncan*, 18 Can. S. C. 710, reversing 16 Ont. App. 3, and affirming 15 Ont. 699.

or prescription over a particular place.¹ The road or way must be substantially the same road or way from one end to the other. It was said in one case that a road cannot be established with a variance of ten or twenty feet;² but a slight variation in the course at a given point, or at the terminus of the way, will not defeat the right.³

The acquisition of the right is not affected by the fact that occasionally, when the ground was soft at a particular point, the adverse claimant turned out of the direct route, and made several distinct tracks.⁴

A deviation in the line of travel does not prevent the acquisition by the public of a highway by adverse user, if the line of travel remains substantially unchanged. It is immaterial that at times to avoid encroachments or obstructions upon the road there have been slight deviations from the common way.⁵

296. A temporary variance from the way on account of its condition does not invalidate the right of the party using it. A right of way may be acquired by user, though between the termini the person claiming the right has at different times taken several different routes to avoid muddy and worn places in the route previously used.⁶

Such a temporary variance of the way does not destroy it. "The wagon track on all roads, to some extent, changes by time; in public roads, the thirty-three feet generally appropriated is within the public right of use; the track, by reason of washing or other causes, by consent of the traveling public who use it, changes a few feet, sometimes to one side of the thirty-three feet, and sometimes to the other, but the road remains substantially the same. Such a change in a roadbed acquired by prescription would not destroy the right."⁷

The fact that the occupants of the farm, in passing with carts from a particular point to a certain gate over a common, on which no definite road was marked out, did not keep to one line, but used

¹ Owens v. Crossett, 105 Ill. 354.

⁵ Nelson v. Jenkins, 42 Neb. 133, 60 N. W. Rep. 311. See Chapter XII.

² Kurtz v. Hoke, 172 Pa. St. 165, 33 Atl. Rep. 549. And see Follendore v. Thomas, 93 Ga. 300, 20 S. E. Rep. 329; Peters v. Little, 95 Ga. 151, 22 S. E. Rep. 44.

⁶ Talbott v. Thorn, 91 Ky. 417, 16 S. W. Rep. 88; O'Daniel v. O'Daniel, 88 Ky. 185, 10 S. W. Rep. 638, distinguishing Bowman v. Wickliffe, 15 B. Mon. 84.

³ Ross v. Thompson, 78 Ind. 90.

⁴ Cheney v. O'Brien, 69 Cal. 199, 10 Pac. Rep. 479.

⁷ Kurtz v. Hoke, 172 Pa. St. 165, 172, 33 Atl. Rep. 549, per Dean, J.

several tracks, did not prevent their acquiring a right of way between that point and the gate.¹

To show that one claiming a right of way by prescription had not confined himself to a definite route, it is not competent to prove that other persons had gone over the land in different directions, and that the place where they traveled was for the time being the way for such persons, and for the claimant of the right of way. The acts of strangers could not defeat or qualify his right.²

297. The fencing of a road or way is not necessary for the purpose of showing an adverse use of it, though it may be important as showing a definite location, a notorious use, and the exclusive character of the claim of right asserted in its use. A statutory provision which prescribes either a substantial inclosure or usual cultivation or improvement as a necessary condition of adverse possession by a person claiming title to land not founded upon a written instrument, has no application to the case of an easement. Such an easement may as well be exercised over an open and uncultivated field as upon one substantially inclosed and usually cultivated. Indeed, inclosure and cultivation would most likely be derogatory to the free exercise of a right of way.³

An appurtenant right of way exists only when one terminus is on the land to which the way is claimed to be appurtenant.⁴

¹ Wimbledon & Putney Commons v. Dixon, 1 Ch. D. 362.

² Smith v. Lee, 14 Gray, 473.

³ Colburn v. Marsh, 68 Hun, 269, 22 N. Y. Supp. 990.

⁴ Whaley v. Stevens, 21 S. C. 479; Moore v. Crose, 43 Ind. 30. See § 35.

CHAPTER VIII.

WAYS OF NECESSITY.

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| <p>I. Founded on implied grant or reservation, 298-314.</p> <p>II. What necessity is requisite, 315-322.</p> <p>III. Extent of the way implied, 323-326.</p> | <p>IV. Location and change of the way, 327-333.</p> <p>V. Duration of the right, 334-336.</p> |
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I. Founded on implied Grant or Reservation.

298. A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over other land of the grantor, or, as an alternative, by passing upon the land of a stranger. In such cases the grantor impliedly grants a right of way over his land as incident to the purchaser's occupation and enjoyment of the grant.¹

¹ Clark v. Cogge, Cro. Jac. 170; Howton v. Frearson, 8 T. R. 50; Holmes v. Goring, 2 Bing. 76; Buckby v. Coles, 5 Taunt. 311; Bolton v. Bolton, 11 Ch. D. 968; Pinnington v. Galland, 9 Exch. 1, 10 Eng. Rul. Cas. 35; Morris v. Edgington, 3 Taunt. 24; Osborn v. Wise, 7 C. & P. 761; Gayford v. Moffatt, L. R. 4 Ch. 133; London v. Riggs, 13 Ch. D. 798; Espley v. Wilkes, L. R. 7 Exch. 298, 303; Pearson v. Spencer, 1 Best & S. 571.

California: Barnard v. Lloyd, 85 Cal. 131, 24 Pac. Rep. 658; Taylor v. Warnaky, 55 Cal. 350; Kripp v. Curtis, 71 Cal. 62, 11 Pac. Rep. 879.

Connecticut: Collins v. Prentice, 15 Conn. 39, 423, 38 Am. Dec. 61; Pierce v. Selleck, 18 Conn. 321, 330; Myers v. Dunn, 49 Conn. 71.

Illinois: Kuhlman v. Hecht, 77 Ill. 570; Oswald v. Wolf, 129 Ill. 200, 21 N. E. Rep. 839.

Indiana: Logan v. Stogsdale, 123 Ind. 372, 24 N. E. Rep. 135; Miller v. Richards, 139 Ind. 263, 38 N. E. Rep. 854; Ellis v. Bassett, 128 Ind. 118, 27 N. E. Rep. 344, 25 Am. St. Rep. 421; Robinson v. Thralkill, 110 Ind. 117, 10 N. E. Rep. 647; Steel v. Grigsby, 79 Ind. 184; Sanxay v. Hunger, 42 Ind. 44; Stewart v. Hartman, 46 Ind. 331; Anderson v. Buchanan, 8 Ind. 132.

Iowa: Thompson v. Miner, 30 Iowa, 386.

Kansas: Mead v. Anderson, 40 Kan. 203, 19 Pac. Rep. 708.

Kentucky: Brown v. Burkenmeyer, 9 Dana, 159, 33 Am. Dec. 541.

Maine: Kingsley v. Gouldsborough Land Imp. Co., 86 Me. 279, 29 Atl. Rep. 1074, 25 L. R. A. 502; Whitehouse v. Cummings, 83 Me. 91, 21 Atl. Rep. 743, 23 Am. St. Rep. 756. The case of Trask v. Patterson, 29 Me. 499, restricting ways of necessity to cases where

“Whenever the thing granted cannot be used for any beneficial purpose by the grantee, without some use of other property of the grantor, the law, which always assumes that the parties intended that the purchaser or grantee should have possession and use of the thing conveyed, infers, as a part of the grant, a right to use that other property, so far as necessary to the fair enjoyment of what was conveyed, although not expressly named in the deed. The common illustration is that of a conveyance of a parcel of land, say one acre, by metes and bounds, out of the center of a lot, entirely surrounded by other land of grantor. In this case the law infers, as part of the grant, a right of access over that other land to the

the land is entirely surrounded by the land of the grantor and not partly by land of strangers, has not been followed, except in *Kuhlman v. Hecht*, 77 Ill. 570.

Maryland: *Oliver v. Hook*, 47 Md. 301; *Mitchell v. Seipel*, 53 Md. 251, 272, 36 Am. Rep. 404; *Brice v. Randall*, 7 Gill. & J. 349; *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353.

Massachusetts: *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Bass v. Edwards*, 126 Mass. 445; *Buss v. Dyer*, 125 Mass. 287; *Oliver v. Dickinson*, 100 Mass. 114; *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43; *Brigham v. Smith*, 4 Gray, 297, 64 Am. Dec. 76.

Michigan: *Powers v. Harlow*, 53 Mich. 507, 19 N. W. Rep. 257.

Mississippi: *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550.

Missouri: *Vossen v. Dautel*, 116 Mo. 379, 22 S. W. Rep. 734; *Chase v. Hall*, 41 Mo. App. 15; *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 99; *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456.

New Hampshire: *Pingree v. McDuffie*, 56 N. H. 306; *Kimball v. Cochecho R. Co.*, 27 N. H. 448, 59 Am. Dec. 387.

New Jersey: *Lore v. Stiles*, 25 N. J. Eq. 381.

New York: *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. Rep. 966, reversing 24 N. Y. Supp. 613; *New York L. Ins.*

Co. v. Milnor, 1 Barb. Ch. 353; *Wells v. Tolman*, 88 Hun, 438, 34 N. Y. Supp. 840; *Holmes v. Seely*, 19 Wend. 507; *Simmons v. Sines*, 4 Abb. Dec. 246; *Smyles v. Hastings*, 22 N. Y. 217; *Williams v. Safford*, 7 Barb. 309; *Fritz v. Tompkins*, 41 N. Y. Supp. 985; *Wheeler v. Gilsey*, 35 How. Pr. 139.

Ohio: *Jones Fertilizing Co. v. Cleveland C. C. & St. L. R. Co.*, 2 Ohio Dec. 511.

Pennsylvania: *Wissler v. Hershey*, 23 Pa. St. 333; *Coleman's Appeal*, 62 Pa. St. 252, 275.

Rhode Island: *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715.

South Carolina: *Lawton v. Rivers*, 2 M'Cord, 445, 13 Am. Dec. 741.

Tennessee: *Brown v. Berry*, 6 Cold. 98.

Texas: *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260.

Vermont: *Wiswell v. Minogue*, 57 Vt. 616; *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. 621.

Virginia: *Bond v. Willis*, 84 Va. 796, 6 S. E. Rep. 136; *Linkenhoker v. Graybill*, 80 Va. 835.

West Virginia: *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. Rep. 1020; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. Rep. 632.

Wisconsin: *Jarstadt v. Smith*, 51 Wis. 96, 8 N. W. Rep. 29.

grantee of the acre. The ground on which this right is based is that of necessity. And this example seems to have been the foundation for the whole doctrine on this subject, which has found its way into the law.”¹

299. The way implied from necessity is one over the grantor's land to the nearest highway.² If, however, there is a road which is open to the public, though it has not been dedicated and accepted as a public highway, a way of necessity may lead to this; and if a way of necessity has been established to such a road, in an action by the party entitled to such way to abate an obstruction to it, he is not required to show that the road to which the way leads had ever been formally laid out, or accepted so as to make it a public highway.³

300. A lease of land, which cannot be approached from a highway, except across other land of the lessor gives a right of way of necessity, in order that the tenement may be rendered beneficial.⁴ If a way granted by a lease cannot be used by reason of its passing over the land of a third person, and there is no other way to the lessee's house, he is entitled to a way of necessity to the nearest public highway across the lessor's land.⁵

On the other hand, a lessor retains a way of necessity over the property demised in case he must necessarily pass over such property to reach a part of his own estate.⁶

A way of necessity arises under a transfer of the equitable title to land with the right of possession. One conferring such a title is presumed to transfer an equitable right of way to and from the land to and from a public highway.⁷

301. The right does not exist in any case in favor of a grantee of the State over other lands belonging to the State. “By public statutes she provides for the establishment and maintenance of public roads, penetrating every neighborhood and sufficiently numerous to meet the general wants of her citizens. Beyond this, and the full protection of the title conferred, she owes her grantees, as such, no duty

¹ Warren v. Blake, 54 Me. 276, 286, 89 Am. Dec. 748, per Kent, J. n. 6; Powers v. Harlow, 53 Mich. 507, 19 N. W. Rep. 257.

² Osborn v. Wise, 7 Car. & P. 761.

⁵ Osborn v. Wise, 7 Car. & P. 761.

³ Cheney v. O'Brien, 69 Cal. 199, 10 Pac. Rep. 479.

⁶ Benedict v. Barling, 79 Wis. 551, 48 N. Y. Rep. 670.

⁴ Gayford v. Moffatt, L. R. 4 Ch. 133; Pomfret v. Ricroft, 1 W. Saund. 321,

⁷ Simmons v. Sines, 4 Abb. App. 246.

or obligation. It would be ruinous to establish the precedent contended for, since by it every grantee from the earliest history of the State, and those who succeed to his title, would have an implied right of way over all surrounding and adjacent lands held under junior grants, even to the utmost limits of the State.”¹

302. There is a way of necessity over the shore of the sea to a wrecked vessel, for the purpose of rendering assistance or to remove the wrecked property. “Originally all wrecks were in the crown, and the king has a right of way over any man’s ground for his wreck, and the same privilege goes to a grantee thereof.”² Although a State has granted away the shore land, it reserves a right of way of necessity to enable it to carry out the provisions of its statutes and of the laws as regards wrecks.³

303. A way of necessity is founded upon an implied grant. The necessity does not in any case create the right. It is only a circumstance resorted to for the purpose of showing the intention of the parties, and raising an implication of a grant.⁴ The right is created by the change of ownership of a portion of an estate, the portion granted having attached to it, by construction as an incident, a right of way over the portion not granted. “Such a way is not created by a mere necessity, but always originates in some grant or change of ownership, to which it is attached, by construction as a

¹ *Pearne v. Coal Creek M. & M. Co.*, 90 Tenn. 619, 627, 18 S. W. Rep. 402, per Caldwell, J.

² *Anon.* 6 Mod. Case, 212.

³ *Hetfield v. Baum*, 13 Ired. 394, 57 Am. Dec. 563.

⁴ *Bullard v. Harrison*, 4 M. & S. 387; *London v. Riggs*, 13 Ch. D. 798; *Proctor v. Hodgson*, 10 Exch. 824; *Pearson v. Spencer*, 1 Best. & S. 571.

California: *Carey v. Rae*, 58 Cal. 159.

Connecticut: *Collins v. Prentice*, 15 Conn. 39, 423, 38 Am. Dec. 61; *Smith v. Tarbox*, 31 Conn. 585; *Woodworth v. Raymond*, 51 Conn. 70.

Indiana: *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. Rep. 135; *Stewart v. Hartman*, 46 Ind. 331.

Maryland: *Brice v. Randall*, 7 Gill. & J. 349; *Oliver v. Hook*, 47 Md. 301.

Massachusetts: *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Brigham v. Smith*, 4 Gray, 297, 64 Am. Dec. 76; *Viall v. Carpenter*, 14 Gray, 126; *Pettingill v. Porter*, 8 Allen, 1, 85 Am. Dec. 671.

Mississippi: *Bonelli v. Blakemore*, 66 Miss. 136, 5 So. Rep. 228.

Missouri: *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456; *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 99.

New Hampshire: *Whittier v. Winkley*, 62 N. H. 338.

Tennessee: *Pearne v. Coal Creek M. Co.*, 90 Tenn. 619, 18 S. W. Rep. 402.

Vermont: *Willey v. Thwing*, 68 Vt. 128, 34 Atl. Rep. 428; *Wiswell v. Minoque*, 57 Vt. 616; *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. 621; *Goodall v. Godfrey*, 53 Vt. 219, 226.

necessary incident, presumed to have been intended by the parties.
 * * * A way of necessity cannot legally exist, where neither the party claiming the way, nor the owner of the land over which it is claimed, nor any one under whom they or either of them claim, was ever seized of both tracts of lands at the same time; and the way can only be created when one of the tracts is conveyed, or the ownership changed by operation of law."¹

304. This is an application of the maxim that one is always understood to intend, as incident, to grant whatever is necessary to give effect thereto which is in the grantor's power to bestow.² The rule applies when there has been a severance of the property, one portion of which has been rendered inaccessible except by passing over the other or by trespassing on the lands of a stranger.³ "When a landowner conveys a portion of his lot, the law will not presume it to have been the intention of the parties that the grantee shall derive no beneficial enjoyment thereof in consequence of its being inaccessible from the highway, or that the other portion shall, for like reason, prove useless to the grantor. This species of right of way, therefore, in the absence of anything to the contrary contained in the deed, becomes an incident to the grant indicative of the intention of the parties."⁴

The necessity must exist at the time of the conveyance and as to the whole tract conveyed. The grantee cannot subsequently subdivide the tract and sell off a portion in such a manner as to create a way of necessity to some particular portion of it, which was not necessary at the time of the conveyance.⁵

The foundation of the rule whereby a right of way of necessity is held to have been impliedly granted or reserved in deeds is, that it was the intention of the parties to the deed that the grantor should convey, and that the grantee should acquire, the means of enjoying the land conveyed, and, therefore, that he should have access to it

¹ Woodworth v. Raymond, 51 Conn. 70, 75, per Loomis, J. And see Stewart v. Hartman, 46 Ind. 331; Prowattain v. Philadelphia, 17 Phila. 158, aff'd 17 W. N. Cas. 261; Tracy v. Atherton, 35 Vt. 52, 82 Am. Dec. 621.

² Whitehouse v. Cummings, 83 Me. 91, 21 Atl. Rep. 743; Pearne v. Coal Creek M. & M. Co., 90 Tenn. 619, 18 S. W. Rep. 402.

³ Pinnington v. Galland, 9 Exch. 1; Kingsley v. Goldsborough Land Imp. Co., 86 Me. 279, 29 Atl. Rep. 1074.

⁴ Whitehouse v. Cummings, 83 Me. 91, 97, 21 Atl. Rep. 743, per Virgin, J.

⁵ Lankin v. Terwilliger, 22 Oreg. 97, 29 Pac. Rep. 268; Richards v. Attleborough Branch R. Co., 153 Mass. 120, 122, 26 N. E. Rep. 418.

over other land of the grantor, if the grantee had no other means of reaching it.¹ "It is not the necessity which creates the right of way, but the fair construction of the acts of the parties."² The necessity merely furnishes evidence as to the real intention of the parties. "For the law will not presume that it was the intention of the parties that one should convey land to the other in such manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. The law under such circumstances will give effect to the grant according to the presumed intent of the parties."³

305. The doctrine of ways of necessity is an exception to the rule that deeds are construed in accordance with their terms, for such ways are implied in direct contradiction to the grantor's covenants of general warranty. "It is a well-established and familiar rule that deeds are to be construed as meaning what the language employed in them imports, and that extrinsic evidence may not be adduced to contradict or affect them. And it would seem that nothing could be clearer in its meaning than a deed of a lot of land, described by metes and bounds, with covenants of warranty against incumbrances. The great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where, by a fiction of law, there is an implied reservation or grant to meet a special emergency, on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation."⁴ In another case before the same court, Mr. Justice Thomas said: "If the way were expressly reserved in the deed, the covenants must apply to the premises granted, that is, an estate with a right of way reserved or carved out of the fee. In the present case, the law does for the parties the same thing, and the covenants apply to an estate with this way of necessity reserved."⁵

¹ Richards v. Attleboro Branch R. Co., 153 Mass. 120, 26 N. E. Rep. 418.

² Nichols v. Luce, 24 Pick. 102, 104, 35 Am. Dec. 302, per Morton, J.; Murphy v. Lincoln, 63 Vt. 278; Goodall v. Godfrey, 53 Vt. 219; Tracy v. Atherton, 35 Vt. 52, 82 Am. Dec. 621; Willey v. Thwing, 68 Vt. 128, 34 Atl. Rep. 428.

³ Collins v. Prentice, 15 Conn. 39, 44, 38 Am. Dec. 61, per Waite, J. And see Robinson v. Clapp, 65 Conn. 365, 384, 32 Atl. Rep. 939, per Fenn, J.

⁴ Buss v. Dyer, 125 Mass. 287, 291, per Soule, J. And see London v. Riggs, 13 Ch. D. 798.

⁵ Brigham v. Smith, 4 Gray, 297, 64 Am. Dec. 76, per Thomas, J.

The fiction of law whereby a way of necessity is implied has been extended to cases of easements of a different character, where the fact has been established that the easement was necessary to the enjoyment of the estate in favor of which it was claimed. The owner of two adjoining lots of land built a house on each, with a chimney between them, which was built entirely on one lot, but was intended for the use of both houses, and had a suitable entrance into it from each house. Afterwards, by simultaneous deeds, he conveyed the lots to different purchasers, describing the lots by metes and bounds, with "all rights, easements, privileges and appurtenances to the said land belonging," and with covenants of warranty against all incumbrances made or suffered by the grantor, but containing no reference to the chimney. In an action by one purchaser against the other for taking down the chimney, the jury found that the plaintiff could have built a chimney on his own land at a reasonable cost; and it was held that if the plaintiff had an easement in the chimney, it was one created by implication, as being absolutely necessary to the enjoyment of his estate; and that on the finding of the jury no such easement was created.¹

306. A way of necessity arises by an implied reservation or regrant, as well as by an implied grant.² In both cases the necessity shows the intention of parties and raises an implication of grant.

¹ Buss v. Dyer, 125 Mass. 287.

² Clark v. Cogge, Cro. Jac. 170; Pomfret v. Ricroft, 1 Wm. Saund. 321, n. 6; Gayford v. Moffatt, L. R. 4 Ch. 133; Howton v. Frearson, 8 T. R. 50; Holmes v. Goring, 2 Bing. 76; White v. Bass, 7 H. & N. 722; Pinnington v. Galland, 9 Ex. 1, 10 Eng. Rul. Cas. 35; Davies v. Sear, L. R. 7 Eq. 427.

Connecticut: Collins v. Prentice, 15 Conn. 39, 38 Am. Dec. 61; Pierce v. Sellick, 18 Conn. 321.

Maryland: McTavish v. Carroll, 7 Md. 352, 61 Am. Dec. 353.

Massachusetts: Adams v. Marshall, 138 Mass. 228, 52 Am. Rep. 271; Schmidt v. Quinn, 136 Mass. 575; Brigham v. Smith, 4 Gray, 297, 64 Am. Dec. 76; Bowen v. Conner, 6 Cush. 132.

Missouri: Vossen v. Dautel, 116 Mo. 379, 22 S. W. Rep. 734.

New Hampshire: Pingree v. McDuffie, 56 N. H. 306.

New Jersey: Seymour v. Lewis, 13 N. J. L. 439, 444, 78 Am. Dec. 108.

Rhode Island: Valley Falls Co. v. Dolan, 9 R. I. 489.

Vermont: Goodall v. Godfrey, 53 Vt. 219; Willey v. Thwing, 68 Vt. 128, 34 Atl. Rep. 428; Wiswell v. Minogue, 57 Vt. 616.

Pennsylvania: Ogden v. Grove, 38 Pa. St. 487; Prowattain v. Philadelphia, 17 Phila. 158.

Wisconsin: Dillman v. Hoffman, 38 Wis. 559; Jarstadt v. Smith, 51 Wis. 96, 8 N. W. Rep. 29.

Texas: Alley v. Carleton, 29 Tex. 74, 94 Am. Dec. 260.

The courts of New York have not yet decided that an implied reservation of such a way exists in favor of the grantor

If a grantor retains land which he cannot beneficially use without crossing the land which he has conveyed, it is only reasonable to find an implied reservation of a way over it.¹ "The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold, if he can reach it in no other way. This presumption prevails over the ordinary covenants of a warranty deed."²

Whether on a conveyance of a lot of land, a way by necessity arises by implication from the deed in favor of some other lot of the grantor, can only be determined by an examination of the title of all the land surrounding this other lot. "As a right of way by necessity once existing may cease in consequence of the conveyances of either the dominant or servient estate, or of other estate surrounding the dominant estate, or of the grants of private rights of way, or of the laying out of public ways, it may often be true that it is as much the duty of the owner of the servient estate, as it is that of the owner of the dominant estate, to ascertain when the right of way ceases."³

A grantor is not allowed to derogate from his absolute grant, except in cases of strict necessity.⁴ The case of ways of necessity is a well-established exception to the general rule.⁵ As to such ways the Supreme Court of Massachusetts say: "The law upon ways by necessity has been frequently considered by this court, and it is established that such ways exist only so long as the necessity exists; that the reservation of such a way to the grantor is to be implied, when necessary, as well as the grant of such a way to the grantee; and that this implied reservation of a way to the grantor over land granted is not a breach of the covenants of warranty or against incumbrances contained in the deed."⁶

over the lands granted. That doctrine, however, has been well established elsewhere. *Fritz v. Tompkins*, 41 N. Y. Supp., 985, where the doctrine is applied to ways of necessity.

¹ *Whittier v. Winkley*, 62 N. H. 338; *Pingree v. McDuffie*, 56 N. H. 306.

² *New York & N. E. R. Co. v. Board of Railroad Com'rs*, 162 Mass. 81, 83, 38 N. E. Rep. 27, per Knowlton, J.;

Brigham v. Smith, 4 Gray, 297, 64 Am. Dec. 297.

³ *Ballard v. Demmon*, 156 Mass. 449, 453, 31 N. E. Rep. 635, per Field, J.

⁴ *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688.

⁵ *Richards v. Rose*, 9 Exch. 218; *Fritz v. Tompkins*, 41 N. Y. Supp. 985, 989.

⁶ *Adams v. Marshall*, 138 Mass. 228, 236, 52 Am. Rep. 271.

307. Even where one conveys to a railroad company a right of way through his land, he has a way of necessity over the land conveyed so as to reach a part that is cut off by the railroad. "But, in regard to ways of necessity," say the Supreme Court of Massachusetts, "we fail to find any different principles established in respect to land sold for a railroad from those applicable in other cases. When a sale is made of a narrow strip of land through the center of a farm, the presumption that the parties do not intend to leave the grantor with no means of reaching or using the land beyond the strip sold, is certainly as strong as when land is sold in other shapes, which would require a way of necessity of much greater length. In these cases the parties recognized the reasonable rule by maintaining farm crossings for many years. Our statutes apply the same rule of policy in this respect to ways across railroads as across other lands. When land is taken for a railroad, and the parties fail to agree about the damages, it is the duty of the county commissioners, on application, not only to estimate the damages, but to order the construction and maintenance of such structures for the security and benefit of the owner as they judge reasonable."¹

A statute providing that where one is cut off from access to his land by the construction of a railroad, the railroad commissioners may order the railroad to maintain crossings, is constitutional, it being merely a regulation of the right of way of necessity previously existing in such case, and no new burden being thereby placed upon the railroad company.²

Though there is a clause in a deed conveying land for a right of way to a railroad company through one's property, releasing damages arising "by reason of the location or construction" of the railroad, it will not be held to release the grantor's right to a way of necessity across the land conveyed, unless facts are shown which favor such a construction.³

But when land is taken for a railroad under the right of eminent domain, and no right of crossing is reserved in the location or ordered by the county commissioners, it is not subject to such a right, even if without it an owner will be cut off from access to his land.⁴

¹ New York & N. E. R. Co. v. Railroad Comr's, 162 Mass., 81, 84, 38 N. E. Rep. 27, per Knowlton, J.

³ New York & N. E. R. Co. v. Railroad Comr's, 162 Mass. 81, 38 N. E. Rep. 27.

² New York & N. E. R. Co. v. Railroad Comr's, 162 Mass. 81, 38 N. E. Rep. 27.

⁴ Googins v. Boston & Albany R. Co., 155 Mass. 505, 506, 30 N. E. Rep. 71; Hamlin v. New York, N. H. & H. R.

308. Where land has been taken by a city for a park under the right of eminent domain, leaving a portion of the land of an owner from whom the city has taken land without an outlet, save by passing over the land of other persons or over the part taken by the city, there is no implied reservation of a way over the lands taken as an outlet to the inclosed land. The use of the land for the purpose of a park is incompatible with any reserved right in the landowner. Moreover, the damages assigned for such taking have reference to the purpose of the taking, and this being inconsistent with the existence of a way over the land taken, no way of necessity can be claimed.¹

309. A way of necessity is implied in a partition between co-tenants, when the circumstances are such that a way of necessity would be implied in ordinary conveyance.² It has been argued that a way of necessity lies in grant, and that the deed of a grantor creates the way, when it is of necessity, as much as it does when it is created by an express grant; but that in case of a partition there is no grant, the original tract which embraced both parcels being owned by persons as tenants in common; that the several ownerships of the different parcels was accomplished by proceedings under the statute for partition; and that no grant can be implied in such case. The Supreme Court of California, in a recent case, replying to this contention, declare that it cannot be sustained either upon principle or authority; that there is no difference in effect between an allotment by order of the court in a proceeding for partition and an allotment by deed from all the other tenants in common; but that the effect in each case is to vest the title of all in a particular parcel in one, the decree operating as such conveyance.³ And so in a Massachusetts case the court had no doubt that by a division of the real estate of a deceased person in the probate court, his heirs, to whom specific portions of that estate were assigned, acquired a right of way to those portions over other lands which had been their ancestor's; "and whether they acquired this right solely as of

Co., 166 Mass. 462, 464; Old Colony R. Co. v. Miller, 125 Mass. 1, 5, 28 Am. Rep. 194; Smith v. New York & N. E. R. Co., 142 Mass. 21, 6 N. E. Rep. 842; Abbott v. New York & N. E. R. Co., 145 Mass. 450, 15 N. E. Rep. 91; Boston Gaslight Co. v. Old Colony & Newport R. Co., 14 Allen, 441.

¹ Prowattain v. Philadelphia (Pa.) 17 W. N. Cas. 261, 17 Phila. 158.

² Ellis v. Bassett, 128 Ind. 118, 27 N. E. Rep. 344.

³ Blum v. Weston, 102 Cal. 362, 36 Pac. Rep. 778, per Haynes, C.

necessity, without any provision therefor in the language of the division, or by the effect of the language used by the committee in making the record of the division, seems to us to be unimportant.

* * * A reservation in terms, 'of a way of necessity,' would confer no further right than would be conferred by operation of law, without those words."¹

In the settlement of an estate between heirs, a farm was conveyed to one, excepting a small piece thereof, which was at the same time conveyed to two other heirs for use as a private cemetery. Such piece was entirely surrounded by the remainder of the farm and lands of others. As the several instruments were of the same date, between the same parties, and related to the same subject, they may be construed as parts of one contract. It was held accordingly that the conveyance carried with it, by necessity, and as a part of the grant, a right of way to the cemetery lot over the remaining part of the farm.²

There is authority, however, that a right of way from necessity does not arise upon the partition of an estate, unless the way previously existed, or it was the plain intention of the parties to impose the servitude.³

310. A valid right of way may be created by partition under order of court, whether the authority to create such right is expressly conferred by the court,⁴ or it is exercised without express direction by the commissioners or committee entrusted with the duty of making the partition.⁵ The commissioners in giving the ways may restrict their use to certain specified purposes, and in that case the persons entitled to such ways cannot use them for any other purpose.⁶

311. Where a judgment-creditor levies on part of the debtor's land, leaving the latter no passage from the remaining portion to the highway, the debtor has necessarily a right of way over the land

¹ Viall v. Carpenter, 14 Gray, 126. In Ellis v. Bassett, 128 Ind. 118, 27 N. E. Rep. 344, the court went so far as to say that "a right of way, upon a severance of the estate by partition between heirs, sometimes arises when it would not exist in case of a conveyance of one portion of the premises."

² Palmer v. Palmer, 150 N. Y. 139, 44 N. E. Rep. 966, reversing 24 N. Y. Supp. 613.

³ Murphy v. Lincoln, 63 Vt. 278, 22 Atl. Rep. 418.

⁴ Carey v. Rae, 58 Cal. 159.

⁵ Symmes v. Drew, 21 Pick. 278; Viall v. Carpenter, 14 Gray, 126; Cheswell v. Chapman, 38 N. H. 14, 75 Am. Dec. 158; Chandler v. Goodridge, 23 Me. 78; Smith v. Tarbox, 31 Conn. 585; White v. Story, 2 Hill, 543, 549.

⁶ Valley Falls Co. v. Dolan, 9 R. I. 489.

levied upon.¹ When land is set off on execution to which no access can be had except over other lands of the debtor, the sheriff may set off to the creditor a right of passage over such other lands. The authority to set off such a passage-way is derived from the principle which establishes ways of necessity.² If no such way is described in the set-off, and the debtor has not assigned or offered to assign any other way, a way of necessity is created.³

312. The stairs and passage-ways of a building become ways of necessity upon the sale or lease of a portion of it, to which access can be had only by means of them. Thus, where three tenants in common of adjoining lots built one building covering these lots, having a single stairway and hall leading to the upper stories, upon a partition of the property between the three owners, it was held that their plan of construction created an easement in the stairway and hall that was appurtenant to each of the lots as a way of necessity.⁴ But this general rule has been qualified in some cases. If the purchaser of a part of a building without stairs can make a stairway in his own part, he cannot claim a way of necessity over the stairway in the grantor's part. The owner of a building containing two stores with a partition wall between them, and with stairs on one side of such partition leading to the second floor, and a door through the partition wall on the second floor at the head of the stairs, sold the store which had no stairs, and in the conveyance made the center line of the partition wall the dividing line. It was held, that the conveyance did not give the grantee a right of way of necessity over the flight of stairs.⁵

313. A grant of minerals carries with it by implication a right of way over the surface of the land for all necessary mining pur-

¹ Pernam v. Wead, 2 Mass. 203, 3 Am. Dec. 43; Taylor v. Townsend, 8 Mass. 411, 5 Am. Dec. 107; Russell v. Jackson, 2 Pick. 574; Allen v. Kincaid, 11 Me. 155.

² Taylor v. Townsend, 8 Mass. 411, 5 Am. Dec. 107.

³ Schmidt v. Quinn, 136 Mass. 575.

⁴ Thompson v. Miner, 30 Iowa, 386; Morrison v. King, 62 Ill. 30; Dillman v. Hoffman, 38 Wis. 559, 575; Jarstadt v. Smith, 51 Wis. 96, 8 N. W. Rep. 29;

Galloway v. Bonesteel, 65 Wis. 79, 26 N. W. Rep. 262, 56 Am. Rep. 616; Benedict v. Barling, 79 Wis. 551, 48 N. W. Rep. 670; Mayo v. Newhoff, 47 N. J. Eq. 31, 19 Atl. Rep. 837; National Exch. Bank v. Cunningham, 46 Ohio St. 575, 22 N. E. Rep. 924; Pierce v. Cleland, 133 Pa. St. 189, 19 Atl. Rep. 352, 7 L. R. A. 752.

⁵ Stillwell v. Foster, 80 Me. 333, 14 Atl. Rep. 731.

poses.¹ When the grant is of the surface land as well as the minerals beneath, the way of necessity must be for the use and enjoyment of both the surface and the minerals. “It does not follow, however, that there shall be two ways — one on the surface and the other under the surface of the servient estate. On the contrary, there can be but one way, and that an overland way. In some cases, as in the one before us, it may happen that the minerals can be more conveniently or profitably removed and put upon the market by an underground than by an overland way; yet that fact will not authorize the implication that the parties intended that a right to the underground way should pass with the deed, which is silent on the subject. The question is not one of convenience, but of necessity. If the necessity exist, then the grantee may have the way over the grantor’s land, and, being thus entitled to the way, he may have it at a place convenient for him. The overland way is one of necessity, the underground way is not; hence the former, not the latter, is the one the claimant may have.”²

A grant of minerals without the surface of the land carries with it as an incident a right to enter upon the surface to remove the minerals, unless there is a positive restriction in the grant. This right includes the right to penetrate through the surface of the land for the purpose of reaching and removing them. The grantee has the right to sink a shaft vertically or to drive a way horizontally, or to do both in different places; but he can use the surface only so far as it is necessary for the reasonable use and enjoyment of his property in the minerals, and he must leave proper support for the surface.³

314. A right of way of necessity being founded on a presumed grant, cannot be acquired over a stranger’s land.⁴ “No necessity will justify an entry upon another’s land. If a man can be supposed

¹ *Marvin v. Brewster Iron M. Co.*, 55 N. Y. 538, 14 Am. Rep. 332; *Pearne v. Coal Creek M. Co.*, 90 Tenn. 619, 18 S. W. Rep. 402.

² *Pearne v. Coal Creek M. & M. Co.*, 90 Tenn. 619, 629, 18 S. W. Rep. 402, per Caldwell, J.

³ *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 332.

⁴ *Bullard v. Harrison*, 4 M. & S. 387, per Lord Ellenborough; *Proctor v. Hodgson*, 10 Exch. 824.

California: *Taylor v. Warnaky*, 55 Cal. 350.

Connecticut: *Collins v. Prentice*, 15 Conn. 39, 423, 38 Am. Dec. 61; *Myers v. Dunn*, 49 Conn. 71, 77; *Woodworth v. Raymond*, 51 Conn. 70.

Indiana: *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. Rep. 135; *Ellis v. Bassett*, 128 Ind. 118, 27 N. E. Rep. 344; *Stewart v. Hartman*, 46 Ind. 331.

Maine: *Whitehouse v. Cummings*,

to hold land without any right of access to it, a grant of it would not convey to the grantee any right to pass over the adjoining land, however necessary it might be to the enjoyment of the thing granted. He would acquire nothing more than his grantor held. The estate would gain no accretion by passing from hand to hand."¹

There must be a privity of estate between the persons claiming such way and the owner of the land over which the way is claimed. There must have been at some prior time a unity of ownership of the two estates which have been severed and a way of necessity over one created in favor of the other.²

There is no implied grant of a way of necessity over land which the grantor owned in some capacity different from that in which he made the conveyance. One tenant in common cannot, by his sole act, create an easement in the premises held in common. Nor can a tenant in common, who owns other premises in severalty so use the last as to acquire or exercise, for the benefit thereof, an easement in the property held in common.³

II. *What Necessity is requisite.*

315. A right of way is never implied because it is convenient. It must be necessary for the reasonable enjoyment of the estate con-

83 Me. 91, 97, 21 Atl. Rep. 743, 23 Am. St. Rep. 756.

Maryland: *Oliver v. Hook*, 47 Md. 301.

Massachusetts: *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188; *Richards v. Attleborough Branch R. Co.*, 153 Mass. 120, 122, 26 N. E. Rep. 418; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302.

Missouri: *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456.

New Hampshire: *Dunklee v. Wilton R. Co.*, 24 N. H. 489, 505; *Pingree v. McDuffie*, 56 N. H. 306.

New York: *Holmes v. Seely*, 19 Wend. 507; *Smyles v. Hastings*, 22 N. Y. 217.

Tennessee: *Pearne v. Coal Creek M. & M. Co.*, 90 Tenn. 619, 18 S. W. Rep. 402.

Vermont: *Wiswell v. Minogue*, 57 Vt. 616; *Tracy v. Atherton* 35 Vt. 52,

82 Am. Dec. 621. In Louisiana, the code allows one a way of necessity over a stranger's land, but he is required to take it where the distance is the shortest to the public road, and where it will be least injurious to the landowner. Rev. Code, arts. 700-702; *Martin v. Patin*, 16 La. 55, 57; *Adams v. Harrison*, 4 La. Ann. 165.

¹ *Nichols v. Luce*, 24 Pick. 102, 104, 35 Am. Dec. 302, per Morton, J.

² *Woodworth v. Raymond*, 51 Conn. 70, 75; *Tracy v. Atherton* 35 Vt. 52, 82 Am. Dec. 621; *Ellis v. Bassett*, 128 Ind. 118, 27 N. E. Rep. 344; *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. Rep. 135; *Stewart v. Hartman*, 46 Ind. 331.

³ *Crippen v. Morss*, 49 N. Y. 63. And see *Great Falls Co. v. Worster*, 15 N. H. 412; *Adam v. Briggs Iron Co.*, 7 Cush. 361, 368; *Marshall v. Trumbull*, 28 Conn. 183, 73 Am. Dec. 667.

veyed.¹ This is the prevailing rule. A way of necessity will not be implied although it would be highly convenient, even if it is apparent on the face of the soil, is in actual use at the time of the

¹ *Proctor v. Hodgson*, 10 Exch. 824; *Holmes v. Goring*, 2 Bing. 76; *Dodd v. Burchell*, 1 H. & C. 113, 122; *London v. Riggs*, 13 Ch. D. 798.

Alabama: *Motes v. Bates*, 74 Ala. 374, 376; *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338.

California: *Ramirez v. McCormick*, 4 Cal. 245; *Carey v. Rae*, 58 Cal. 159.

Connecticut: *Woodworth v. Raymond*, 51 Conn. 70; *Myers v. Dunn*, 49 Conn. 71; *Seeley v. Bishop*, 19 Conn. 128; *Pierce v. Sellick*, 18 Conn. 321, 330; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

Illinois: *Kuhlman v. Hecht*, 77 Ill. 570.

Indiana: *Anderson v. Buchanan*, 8 Ind. 132.

Iowa: *Ward v. Robertson*, 77 Iowa, 159, 41 N. W. Rep. 603; *Thompson v. Miner*, 30 Iowa, 386, 390.

Kentucky: *Hall v. McLeod*, 2 Metc. 98, 74 Am. Dec. 400.

Louisiana: *Martin v. Patin*, 16 La. 55, 57.

Maine: *Kingsley v. Gouldsborough Imp. Co.*, 86 Me. 279, 29 Atl. Rep. 1074; *Allen v. Kincaid*, 11 Me. 155; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Stevens v. Orr*, 69 Me. 323; *Stillwell v. Foster*, 80 Me. 333, 14 Atl. Rep. 731; *White v. Bradley*, 66 Me. 254; *Whitehouse v. Cummings*, 83 Me. 91, 98, 21 Atl. Rep. 743; *Trask v. Patterson*, 29 Me. 499.

Massachusetts: *Baker v. Crosby*, 9 Gray, 421; *Parker v. Bennett*, 11 Allen, 388; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161; *Gayetty v. Behune*, 14 Mass. 49, 7 Am. Dec. 188.

Michigan: *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. Rep. 509.

Mississippi: *Bonelli v. Blakemore*, 66 Miss. 136, 5 So. Rep. 228.

Missouri: *Cooper v. Maupin*, 6 Mo. 624, 25 Am. Dec. 456; *Field v. Mark*, 125 Mo. 502, 28 S. W. Rep. 1004.

New Hampshire: *Wentworth v. Philpot*, 60 N. H. 193; *Kimball v. Cocheco R. Co.*, 27 N. H. 448, 59 Am. Dec. 387.

New Jersey: *Stuyvesant v. Woodruff*, 21 N. J. L. 134, 47 Am. Dec. 156.

New York: *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. Rep. 966, 71 Hun, 30, 24 N. Y. S. 613; *Parsons v. Johnson*, 68 N. Y. 62; *Smyles v. Hastings*, 22 N. Y. 217, 223; *Wheeler v. Gilsey*, 35 How. Pr. 139.

Pennsylvania: *Bascom v. Cannon*, 158 Pa. St. 225, 27 Atl. Rep. 968; *Francies's Appeal*, 96 Pa. St. 200; *Ogden v. Grove*, 38 Pa. St. 487; *M'Donald v. Lindall*, 3 Rawle, 492.

Rhode Island: *Valley Falls Co. v. Dolan*, 9 R. I. 489; *O'Rorke v. Smith*, 11 R. I. 259, 23 Am. Rep. 448.

South Carolina: *Lawton v. Rivers*, 2 M'Cord, 445, 13 Am. Dec. 741; *Turnbull v. Rivers*, 3 M'Cord, 131, 140, 15 Am. Dec. 622; *Screven v. Gregorie*, 8 Rich. 158, 64 Am. Dec. 747.

Tennessee: *Pearne v. Coal Creek M. Co.*, 90 Tenn. 619, 18 S. W. Rep. 402.

Texas: *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260.

Vermont: *Wiswell v. Minogue*, 57 Vt. 616; *Hyde v. Jamaica*, 27 Vt. 443, 460. To the contrary, and not now regarded as law, see dictum of Lord Mansfield, saying: "I know not how it has been expounded, but it would not be a great stretch to call that a necessary way without which the most convenient and reasonable mode of enjoying the premises could not be had," in *Morris v. Edgington*, 3 Taunt. 31, and see *Pheysey v. Vicary*, 16 M. & W. 484; *Lawton v. Rivers*, 2 M'Cord, 445, 13 Am. Dec. 741; *Alley v. Carleton*, 26 Tex. 74, 94 Am. Dec. 260; and see

conveyance, and the deed conveys the land with all the privileges and appurtenances thereto belonging, unless the way is clearly necessary to the beneficial use and enjoyment of the estate conveyed.¹

Many of the cases cited say that the way must be one of strict necessity, but the better rule and that adopted in some of the latest and most important cases is that the necessity must be a reasonable one.

316. In some States the necessity need not be an absolute physical necessity. The word is to have a reasonable and liberal interpretation. The way must be reasonably necessary. If it were limited to an absolute physical necessity, a way could not be implied if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but one thousand dollars, it would follow from this construction that the purchaser would not have a right of way over the intervening piece as appurtenant to the land, provided he could make another way at an expense of one hundred thousand dollars.²

317. There is no way of necessity in case the granted land adjoins a public road on one side, although a way over other land of the grantor would give the grantee access to another public road much better than that on which the land borders, and would save him a mile or two in distance. These considerations only go to the

similar view in regard to a water course expressed in *Watts v. Kelson*, 6 Ch. App. 166, 175.

¹ *Stevens v. Orr*, 69 Me. 323; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748.

² *Pettingill v. Porter*, 8 Allen, 1, 6, 85 Am. Dec. 671, per Chapman, J. Followed and approved in *Smith v. Griffin*, 14 Colo. 429, 23 Pac. Rep. 905, per Helm, C. J.; *Oliver v. Pitman*, 98 Mass. 46, 50; *Schmidt v. Quinn*, 136 Mass. 575, 576; *Paine v. Chandler*, 134 N. Y. 385, 19 L. R. A. 99, 32 N. E. Rep. 18. See also *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671. In *O'Rourke v. Smith*, 11 R. I. 259, 264, 23 Am. Rep. 440, *Durfee, C. J.*, said: "If

the grant of a way, existing previously *de facto*, can be implied from anything short of necessity, we think at any rate that the party claiming the way should be required either to show, as in *Pettingill v. Porter*, 8 Allen, 1, 85 Am. Dec. 671, that, without the use of the way, he will be subjected to what, considering the value of the granted estate, will be an excessive expense; or to show, as in *Thompson v. Miner*, 30 Iowa, 386, that there is a manifest and designed dependence of the granted estate upon the use of the way for its appropriate enjoyment; or to adduce some other indication equally conclusive."

matter of convenience and do not lay any foundation for a right of way of necessity.¹

The purchaser of a city lot seventy-five feet deep, with a frontage of twenty-five feet on a street, is not entitled to a way by necessity to the rear of his lot over the adjacent land of his grantor.²

318. A way of necessity never exists where one can get to the granted land through other land of his own, or over way granted to him, however inconvenient the way may be.³

One can have no way of necessity in case he has a prescriptive right of way over other land. Thus, where the owner of land bounded on one side by a highway, and on all other sides by lands of other owners, has a prescriptive right of way over an adjoining lot by which he can reach the highway, and sells that portion of his land which is next to the highway, he retains no right of way by necessity over this land.⁴

One is not entitled to such a way for the reason that the way over his own land is too steep or too narrow, or, in any way, or to any degree, inconvenient.⁵ A way of necessity cannot exist from one part of his land to another part of the same tract, over the land of another.⁶

319. But the fact that one has a right of way by grant or reservation, for a limited or special purpose, does not debar him from a way of necessity for all purposes. Thus, where one reserved a right of way to a certain lot for the purpose of carting wood, and

¹ Vossen v. Dautel, 116 Mo. 379, 22 S. W. Rep. 734; Cooper v. Maupin, 6 Mo. 624, 35 Am. Dec. 456; Smith v. Griffin, 14 Colo. 429, 23 Pac. Rep. 905; Nichols v. Luce, 24 Pick. 102, 35 Am. Dec. 302; Russell v. Jackson, 2 Pick. 574; Gayetty v. Bethune, 14 Mass. 49, 7 Am. Dec. 188; Fischer v. Laack, 76 Wis. 313, 45 N. W. Rep. 104; Turnbull v. Rivers, 3 M'Cord, 131, 15 Am. Dec. 622; Stuyvesant v. Woodruff, 21 N. J. L. 133, 140, 47 Am. Dec. 156.

² Smith v. Griffin, 14 Colo. 429, 23 Pac. Rep. 905.

³ Staple v. Heydon, 6 Mod. 1, 4; Oliver v. Pitman, 98 Mass. 46, 50; Viall v. Carpenter, 14 Gray, 126; Cooper v. Maupin, 6 Mo. 624, 35 Am. Dec. 456; Field v. Mark, 125 Mo. 502; M'Donald

v. Lindall, 3 Rawle, 492; Ogden v. Grove, 38 Pa. St. 487; Hyde v. Jamaica, 27 Vt. 443, 460; Russell v. Napier, 82 Ga. 770, 774, 9 S. E. Rep. 746; Morgan v. Meuth, 60 Mich. 238, 27 N. W. Rep. 509; Allen v. Kincaid, 11 Me. 155; Stuyvesant v. Woodruff, 21 N. J. L. 133, 140, 47 Am. Dec. 156; Turnbull v. Rivers, 3 McCord, 131, 15 Am. Dec. 622; Motes v. Bates, 74 Ala. 374; Ward v. Robertson, 77 Iowa, 159, 41 N. W. Rep. 603.

⁴ Leonard v. Leonard, 2 Allen, 543.

⁵ Dodd v. Burchell, 1 Hurl. & C. 113; Carey v. Rae, 58 Cal. 159; Kripp v. Curtis, 71 Cal. 62, 11 Pac. Rep. 879; M'Donald v. Lindall, 3 Rawle, 492.

⁶ Cooper v. Maupin, 6 Mo. 624, 25 Am. Dec. 456.

his grantee afterwards built a house upon such a lot, it was held that the latter was entitled to a way of necessity for access to the house. "Upon the conveyance of the piece of land inaccessible except for a single purpose, in the absence of an express agreement by the grantee to accept it in that condition, the law instantly laid in its favor upon the *locus in quo* the burden of an unlimited way of necessity for all legal uses; in the absence of such agreement the law will not presume that the grantee accepted in lieu of this a right less in extent and value; on the contrary, it will presume that the grantor received payment for, and intended to convey, land which, in addition to this unlimited way, had another for a specified single purpose."¹

320. That the land conveyed is surrounded on three sides by the sea does not raise an implication of a grant of a way across the grantor's adjoining land.²

As the land can be reached by way of the sea, no way of necessity exists. The waters of the sea are navigable, and there is a public right of travel over them. It might often be more convenient for the purchaser to pass over the grantor's land instead of being under the necessity of using the waters of the sea to reach his land; but this inconvenience is not such as the law requires to constitute a legal necessity for a way.³

321. A purchaser is not entitled to a way of necessity in case he has agreed with his grantor, even verbally, not to claim a way. Where a bill was filed to secure a way of necessity, it appeared

¹ Myers v. Dunn 49 Conn. 71 78 per Pardee, J.

² Kingsley v. Gouldsborough Land Imp. Co., 86 Me. 279, 29 Atl. Rep. 1074, 25 L. R. A. 502.

³ Kingsley v. Gouldsborough Land Imp. Co., 86 Me. 279, 29 Atl. Rep. 1074. In Turnbull v. Rivers, 3 McCord, 131, 140, 15 Am. Dec. 622, Nott, J., said:

"Suppose one person should sell to another the extreme point of a neck or tongue of land, surrounded by an open sea or navigable streams, except on one side, would it be understood that the seller should allow him a right of way through the whole neck of land because sometimes it would be more

convenient for him to go to his farm by land than by water? I should apprehend not." In Lawton v. Rivers, 2 McCord, 445, 448, the court said: "The plaintiff has a navigable water course from his door to the public road or highway, by which the distance is not greater than by land; and although there may be some inconvenience in being obliged always to go by water, when he visits this plantation, yet it is not greater than necessarily attends every insular situation, and perhaps not so great to him as it would be to his neighbor to keep up a lane through his plantation for his accommodation."

that at the time of the purchase a way of necessity would have passed as an incident, except that the grantor refused to sell if the grantee was to have a right of way over his land; that the grantee declared there was no occasion for such a right of way, because he could have one over a railroad company's lands to a highway; that the conveyance was made, and that the grantee had a license to pass over the railroad company's lands, which license was subsequently revoked. It was held that the court would not aid the complainant in establishing a way of necessity by issuing a preliminary injunction.¹

Where one having a way appurtenant to his land over the land of another, releases to a purchaser of the servient estate all his title and interest in the right of way including "all rights of crossing said lot as a private way, if any I have or may appear to have," he can claim no way of necessity to the highway out of the right of way released. The law does not prohibit one from cutting himself off from all access to his land.²

322. The right to a way of necessity may be enforced even after the original grantor has conveyed his land to another. Though both parties claim through a common grantor, the owner of the land surrounded is entitled to a way as of necessity across the land of the other. The original grantor granted as appurtenant to the parcel expressly conveyed, but having no access to a public road, a way which will enable his grantee to obtain such access. "Both the corporeal property and the incorporeal right pass from the grantor at the same time — one as to the inseparable incident of the other; and a subsequent grantee must necessarily take the land conveyed to him subject to the burden created by the implied grant."³

III. *Extent of the Way implied.*

323. The extent of a way of necessity is a way such as is required for the complete and beneficial use of the land to which such way is impliedly attached. Whether such right of way is limited to such a way as was necessary at the time of grant, for the use of the land in the condition in which it then was; or whether it is limited to such use of the land as was then contemplated; or

¹ *Ewert v. Burtis* (N. J.) 12 Atl. Rep. 893.

² *Richards v. Attleborough Branch R. Co.*, 153 Mass. 120, 26 N. E. Rep. 418.

³ *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. Rep. 135, per Elliott, J. To same effect *Taylor v. Warnaky*, 55 Cal. 350.

whether the grantee, being entitled to use the land for any legitimate purpose, he is consequently entitled to a right of way commensurate with his right of enjoyment, are questions of which there has been much discussion, and upon which the courts have not always expressed themselves with clearness and precision. The prevailing view in this country is, that a way of necessity is not limited to such use of the land granted as was actually made or contemplated at the time of the conveyance, but is a way for any use to which the owner may lawfully put the granted land at any time. But the property conveyed may be such that it necessarily imports a limited use of a way to it. Thus a way of necessity to a mill-dam and race, which are the property conveyed, is clearly for the purpose of repairing them, and is a limited right of way for that purpose, to be used only as occasion requires, and not for ordinary or general purposes. The owner of the land subject to such easement may plough up and cultivate the land without necessarily creating such an obstruction as would prevent the convenient use of the way for repairing the dam and race.¹

324. The way implied is usually one for all purposes for which the grantee may need to use it for the full enjoyment of the property conveyed. Where land to which there was no access, except over the land of the grantor, was purchased with the knowledge of the grantor, for the purpose of erecting a dwelling-house thereon, it was held, that the purchaser was entitled to a carriage-way across the grantor's land to a street, although there was a footway along the edge of a park to another street. The law implies a grant of a right of way sufficient to give the grantee the complete and beneficial use of the land in the manner contemplated by the parties at the time. In a New Jersey case,² the vice-chancellor delivering the decision, said: "Admitting that the grant of a way is a necessary incident to the conveyance only where the way is necessary to the enjoyment of the thing conveyed, and that the test of such necessity is that the land conveyed is land-locked, and does not touch a public highway, still I can find no authority for the position that a mere footway along a park is a public highway, and none such was pointed out by the counsel. A public highway is one over and upon which the public have a right to pass with cattle and

¹ *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353.

² *Camp v. Whitman* (N. J. Eq.) 26 Atl. Rep. 917.

wheeled vehicles. A sidewalk for foot travelers is a part of a highway, but does not of itself constitute one, and never has, so far as I know, within the history of the common law. Ordinarily, in these cases, the right of way implied is one for all purposes, and the cases where it has been restricted are rare and of recent date." To like effect, the Supreme Court of Connecticut said: "The owner of land has a right to the most profitable use, the most beneficial enjoyment thereof, subject to limitations not necessary here to be mentioned. He may erect buildings and raise grain upon and dig ores beneath it;" and when a way of necessity has been imposed in favor of land granted or reserved, it is presumed to have been done for any or all of these purposes; "and the law will declare that it may be used for all, for it desires and encourages proprietors to increase the value of their land by building houses upon and cultivating it."¹

In New Hampshire, also, a way of necessity may be used in connection with any lawful use that the owner can make of the land to which the way is appurtenant. "To confine the use of the way to the purposes for which the land is occupied at a particular time, is to exclude the grantor in the case of an implied reservation, and the grantee, in the case of an implied grant of a way, from using their land in any other manner. It is a practical limitation on the estate retained or conveyed. If the parties supposed a way passed as a necessary incident of the grant, how can it be inferred that they intended only a way for a particular purpose, when they knew the land was capable of being used for many purposes?"²

325. There is, however, strong authority for holding that a way of necessity by implied reservation or re-grant is limited to the necessity existing at the time of the grant. "That appears to me," said Jessel, M. R., "to be the meaning of a right of way of necessity. If you imply more, you reserve to him not only that which enables him to enjoy the thing he has reserved as it is, but that which enables him to enjoy it in the same way and to the same extent as if he reserved a general right of way for all purposes: that is — as in the case I have before me — a man who reserves two acres of arable land in the middle of a large piece of land is to be entitled to cover the reserved land with houses, and call on his grantee to allow him to make a wide metaled road up to it. I do not think that is a fair meaning of a way of necessity. I think it must be limited by the

¹ Myers v. Dunn, 49 Conn. 71, 77, per Pardee, J.

² Whittier v. Winkley, 62 N. H. 338, 341, per Stanley, J.

necessity at the time of the grant; and that the man who does not take the pains to secure an actual grant of a right of way for all purposes, is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. I am not aware of any other principle on which this case can be decided. I may be met by the objection that a way of necessity must mean something more than what I have stated, because, where the grant is of the inclosed piece, the grantee is entitled to use the land for all purposes, and should therefore be entitled to a right of way commensurate with his right of enjoyment. But there again the grantee has not taken from the grantor any express grant of a right of way, and all he can be entitled to ask is a right to enable him to enjoy the property granted to him as it was granted to him. It does not appear to me that the grant of the property gives any greater right. But even if it did, the principle applicable to the grantee is not quite the same as the principle applicable to the grantor; and it might be that the grantee obtains a larger way of necessity — though I do not think he does — than the grantor does under the implied re-grant.”¹

326. In either view, a way of necessity is a way for all purposes for which the land granted or reserved is to be used. It must be a suitable way for the business to be carried on, or for the particular purpose for which the land was bought.² On the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building, in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity. “In my opinion,” said Lord Romilly, “when a man buys a house in a street or road, with an archway occupying the position of thirteen feet of the ground floor, with a direct paved road under it, and an interrupted foot pavement on each side, being all the marks of a road leading to mews, he is put on inquiry as to what other means of access there are to the mews; and if the whole space behind is vacant, and unbuilt upon, he is put on inquiry to ascertain whether the plan for laying out the ground will give any other means of access to the mews except through and under this archway.”³

¹ London v. Riggs, 13 Ch. D. 798, D. 679; Gayford v. Moffatt, L. R. 4 Ch. 807.

133.

² Serff v. Acton Local Board, 31 Ch. ³ Davies v. Sear, L. R. 7 Eq. 427, 433.

IV. *Location and Change of the Way.*

327. The grantor may, in the first instance, locate the way of necessity over his land;¹ but, in the event of his failure to do so, the grantee may choose it for himself. The grantor may designate a particular way in preference to the one in use at the time of the conveyance; and the subsequent use by the grantee of the way so designated is a sufficient acceptance of it, and is also sufficient notice of its existence to all persons claiming under the grantor.

If the grantor does not locate a suitable way, and he does not agree with his grantee upon the location of such a way, the grantee may select a suitable route for his way, but in doing so he must have regard to the interest and convenience of the grantor. He has no right to pass over the grantor's land wherever he pleases; and, when he has selected a suitable route, he must abide by it and cannot change the route as he may please.²

The person by whose act the way is created is entitled to select the way.³ Therefore, when the owner of two tenements disposes of the outer one, retaining the inner or land-locked parcel, the grantor, the person who created the right of way, has the right to select it.

328. An implied way of necessity is, of course, undefined, only that it must be established in such a manner as to reasonably meet the necessities of the dominant estate and not unreasonably injure the servient estate.⁴ The parties may agree upon a location of it, and they may change any location by mutual agreement. Such agreement need not be in writing, but may be inferred from the

¹ Pearson v. Spencer, 1 B. & S. 571, 585, 3 B. & S. 761; Bolton v. Bolton, 11 Ch. D. 968; Kripp v. Curtis, 71 Cal. 62, 11 Pac. Rep. 879; Schmidt v. Quinn, 136 Mass. 575; Russell v. Jackson, 2 Pick. 574; Hart v. Connor, 25 Conn. 331; Dunham v. Pitkin, 53 Mich. 504, 19 N. W. Rep. 166; Palmer v. Palmer, 150 N. Y. 139, 44 N. E. Rep. 966, reversing 24 N. Y. Supp. 613; Fritz v. Tompkins, 41 N. Y. Supp. 985; Holmes v. Seely, 19 Wend. 507; Smiles v. Hastings, 24 Barb. 44; Capers v. Wilson, 3 M'Cord, 170.

² Nichols v. Luce, 24 Pick. 102, 104, 35 Am. Dec. 302; Palmer v. Palmer, 150 N. Y. 139, 44 N. E. Rep. 966, reversing 24 N. Y. Supp. 613.

³ Pearson v. Spencer, 1 B. & S. 571, 585; 3 B. & S. 761; Bolton v. Bolton, 11 Ch. D. 968.

⁴ Bolton v. Bolton, 11 Ch. D. 968; Brown v. Alabaster, 37 Ch. D. 490, 500; Pearne v. Coal Creek M. Co., 90 Tenn. 619, 18 S. W. Rep. 402; Nichols v. Luce, 24 Pick. 102, 104, 35 Am. Dec. 302; Holmes v. Seely, 19 Wend. 507.

words and conduct of the parties. When the way has once been adopted and located, the parties are bound by it.¹

The mere fact that the grantor has used a particular route for a long time to reach the land conveyed, does not necessarily imply that this route shall be used as a way of necessity to such land to the exclusion of any other practicable and convenient way to the highway. It may be, that if the grantee uses such route after the conveyance, his use of it may amount to an acceptance of such way as a convenient one which would deprive him of the right to use any other route while this was unobstructed.²

329. The way implied is a convenient way over some part of the grantor's surrounding land, and not a way in every part of it.³ It is not a right to go indiscriminately over any part of the land of the grantor. It is a certain, definite, fixed way, defined either by the agreement of the parties, or by designation by the grantor, or, upon his failure to locate it, by the grantee's location or use of a definite route.⁴ When the location of such way is shown by the use of a particular way for many years, by those who have had occasion to take crops from the dominant estate, evidence of the whole mode of such use, and by what route, is competent evidence when tendered by either party.⁵

330. If the line of a way of necessity has once been selected or adopted by the claimant of the way and the owner of the land, and has been defined, graded and conformed to by both, and traveled in uniformly for a long time, it cannot afterwards be changed at the pleasure of one party. It can only be changed by the agreement of both parties; and when the change is actually made, and a new way adopted by them, this new way fixes and determines their respective rights.⁶ Where one entitled to a right of way by necessity to a private cemetery over the land of another, selects and uses a way for years without objection by the owner of the land, the right to such use is not extinguished by the opening by the owner of another way, leading from the cemetery to a private way used by the own-

¹ Smith v. Lee, 14 Gray, 473; Rumill v. Robbins, 77 Me. 193. Am. Dec. 302; White v. Bradley, 66 Me. 254; Holmes v. Seely, 19 Wend. 507.

² Bass v. Edwards, 126 Mass. 445.

³ Brice v. Randall, 7 Gill. & J. 349; White v. Bradley, 66 Me. 254.

⁵ Chase v. Perry, 132 Mass. 582.

⁴ Chase v. Perry, 132 Mass. 582; Nichols v. Luce, 24 Pick. 102, 104, 35

⁶ Smith v. Lee, 14 Gray, 473; Pearson v. Spencer, 1 B. & S. 571.

ers of the adjoining lands for access to their premises, and in which the owner of the cemetery has no easement.¹

A right of way by necessity cannot be changed by the owner of the servient estate, after an uninterrupted existence of more than twenty years, without the consent of the owner of the dominant estate.²

331. There can be but one way of necessity to the same close.

If one purchases land to which the grantor had previously used two distinct ways over his other land, the purchaser is not entitled to both, and it is the right of the grantor to select the way that shall go with the land.³ If, however, the land granted is divided into two or more parts by impassable barriers, such as a mountain or river, the grantor would by necessary implication convey a right of way to each separate part, as otherwise some portion of the land granted would be useless to the purchaser. "But these implications of grants are looked upon with jealousy and construed with strictness. It is only the necessity of the case which will carry one way; and certainly the necessity must be not less strong to carry two."⁴

Where a purchaser was entitled to a way of necessity, it appeared that at least two roads had been used indifferently for many years, by the occupants of the land purchased. There was no new location of the way of necessity by the parties, but for four years after the purchase the purchaser used one road without objection on the part of his grantor. He was then forbidden by the grantor to use this particular road. No objection was made to the use of the other road, which was equally convenient for the purchaser. Afterwards he and others applied to the municipal officers to lay out a public way over this other road, and they accordingly did so, the grantor waiving damages for crossing his land. The purchaser then claimed the way was not legally laid out. But the court regarded this as immaterial, saying that if it was a statute way, the right of way by necessity was thereby ended; that if it was not a statute way, no one but the grantor could prevent the use of it, and he would be estopped; that the conduct of both parties showed a mutual designation of this

¹ *Palmer v. Palmer*, 150 N. Y. 139, 44 968. See as to selection, *Pearson v. Spencer*, 1 B. & S. 571, 585; *Dodd v. Burchell*, 1 H. & C. 113; *Pheysey v. Vicary*, 16 M. & W. 484.

² *Hines v. Hamburger* 43 N.Y. Supp. 377.

⁴ *Nichols v. Luce*, 24 Pick. 102, 105,

³ *Bolton v. Bolton*, L. R. 11 Ch. Div. 35 Am. Dec. 302, per Morton, J.

route for the way of necessity; that the purchaser procured the way to be defined, and the grantor had forbidden the use of the other road; and that the way laid out by the town officers was either a public way or a way of necessity by the action of the parties.¹

332. A way of necessity cannot be subsequently enlarged and made more burdensome. The right becomes fixed immediately upon the conveyance. Thus, where one, by virtue of a grant of land, acquires a right of way of necessity from such land to a highway, which crossed adjoining land belonging to the grantor, the right of way terminated at the side of the highway; and when subsequently the highway was discontinued and a new highway laid out beyond it over the grantor's land, the way of necessity will not be enlarged so as to enable the grantee to use the discontinued portion of the highway for the purpose of reaching the new highway. If the deed had expressly described such a way as appurtenant to the land sold, the grantee would have acquired no additional rights upon the discontinuance of the highway.²

333. As a general rule one entitled to a way of necessity is bound to keep to the way laid out, or that located by use, unless that way has been obstructed by the owner of the servient estate. The rule is stated by Chief Justice Nelson, in a New York case: ³ "In respect to a public way, if there be an obstruction so as to make the ordinary track dangerous, the traveler may go *extra viam* passing as near to the original way as possible."⁴ This rule, generally, is not applicable to a private way which becomes foundeours or impassable,⁵ as where a specific way is prescribed for, no implication of a right arises to go to the right or left; or, in the language of Lord Ellenborough, 'to break out of it at random over the whole surface of the close.' Highways are for the public service, and if the usual track be impassable, the general good requires that there should be

¹ Rumill v. Robbins, 77 Me. 193. And see Abbott v. Stewartson, 47 N. H. 228.

² Morse v. Benson, 151 Mass. 440, 24 N. E. Rep. 675, Knowlton, J., said: "Upon the discontinuance of the highway he was entitled to damages, on the ground that he was thereby cut off from his only means of reaching his land, and that his lot and his easement had become of little value. His remedy

was to be sought in a claim for damages, and not by attempting to extend his way of necessity over land which, on the discontinuance of the highway, had reverted to the owner of the fee."

³ Holmes v. Seely, 19 Wend. 507, 510; Bullard v. Harrison, 4 M. & S. 387,

⁴ Henn's Case, Sir Wm. Jones, 296; Absor v. French, 2 Show. 28. See § 348.

⁵ Taylor v. Whitehead, 2 Doug. 745; Bullard v. Harrison, 4 M. & S. 387.

an outlet, so that the people may at all times have a passage. The better opinion, however, seems to be, that in the case of a private way of necessity, a passage *extra viam* may be justified where the usual track is obstructed. There is a distinction between a private way by grant and one of necessity, resting upon the ground that the one is the grant of a specific track over the close, while the other is a general right to a way over it; the one an express specific grant, the other a mere implied one. If the outlet in case of obstruction exist at all in the case of a way of necessity, it is clear that it does not, where it could be avoided by reasonable repairs; and this duty devolves upon the party enjoining the benefit of the way."

The distinction incidentally referred to by Chief Justice Nelson and by Mr. Justice Buller, in *Taylor v. Whitehead*, between a private way by grant and one by necessity, seems not to be well founded, for a way of necessity is nothing else but a way by grant. One having a way of necessity has only a convenient way which must be a defined way. "After the way has once been assigned, or selected, it rests on the same footing as any other way by grant, and both parties are bound by it; the grantor not to obstruct it, and the grantee to be confined to it."¹

If the owner of land subject to a way of necessity over it to a highway, obstructs it, the person having the right of way may cross the land of such owner at some other convenient place to reach the highway, doing no unnecessary damage.²

V. *Duration of the Right.*

334. The way ceases when the necessity from which it results ceases.³ But where a way of necessity has once existed, it will be

¹ *Williams v. Safford*, 7 Barb. 309, 312
per Willard, J.

² *Henn's Case*, Sir W. Jones, 296;
Leonard v. Leonard, 2 Allen, 543; *Farnum v. Platt*, 8 Pick. 339, 19 Am. Dec. 330; *Bass v. Edwards*, 126 Mass. 445; *Johnson v. Borson*, 77 Wis. 593, 20 Am. St. Rep. 146, 46 N. W. Rep. 815; *Jarstadt v. Smith*, 51 Wis. 96, 98, 8 N. W. Rep. 29; *Haley v. Colcord*, 59 N. H. 7, 47 Am. Rep. 176, a way of prescription; *Holmes v. Seely*, 19 Wend. 507; *Kent v. Judkins*, 53 Me. 160, 163, 87 Am. Dec. 544. "Vainly does he who

offends against the law seek the help of the law. The law will not allow the owner to complain of a breach of his close which his own unlawful acts have made necessary." Per Walton, J.

³ *Gayford v. Moffatt*, L. R. 4 Ch. 133; *Holmes v. Goring*, 2 Bing. 76, 9 Moore, 166; *Pearson v. Spencer*, 3 B. & S. 751.

California: *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. Rep. 879; *Carey v. Rae*, 58 Cal. 159.

Connecticut: *Seeley v. Bishop*, 19 Conn. 128; *Collins v. Prentice*, 15 Conn.

presumed to exist until some fact is shown establishing its non-existence.¹

“A way of necessity, when the nature of it is considered,” says Chief Justice Best,² “will be found to be nothing else than a way by grant; but a grant of no more than the circumstances, which raise the implication of necessity, require should pass. If it were otherwise, this inconvenience might follow, that a party might retain a way over one thousand yards of another’s land, when, by a subsequent purchase, he might reach his destination by passing over one hundred yards of his own. A grant, therefore, arising out of the implication of necessity cannot be carried farther than the necessity of the case requires.”

A way of necessity appurtenant to land set out as dower, and not simply appurtenant to the freehold estate of the dowager, is not extinguished on the death of the widow, but remains annexed to the reversionary estate.³

335. The owner of land may voluntarily cut himself off from all access to it. A release by deed, by the owner of the dominant estate to the owner of the servient estate, of his right of way thereon, is valid, notwithstanding the dominant estate is entirely surrounded by the servient estate and other lands, and there is no presumption that there was an intention to reserve a right of way out of the

39, 38 Am. Dec. 61; *Pierce v. Selleck*, 18 Conn. 321.

Georgia: *Russell v. Napier*, 82 Ga. 770, 774, 9 S. E. Rep. 746.

Maine: *Whitehouse v. Cummings*, 83 Me. 91, 98, 21 Atl. Rep. 73, 23 Am. St. Rep. 756.

Maryland: *Oliver v. Hook*, 47 Md. 301.

Massachusetts: *Rowell v. Doggett*, 143 Mass. 483, 489, 10 N. E. Rep. 182; *Adams v. Marshall*, 138 Mass. 228, 52 Am. Rep. 271; *Schmidt v. Quinn*, 136 Mass. 575, 577; *Viall v. Carpenter*, 14 Gray, 126; *Baker v. Crosby*, 9 Gray, 421; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188; *Hancock v. Wentworth*, 5 Met. 446.

New Hampshire: *Abbott v. Stewarts-town*, 47 N. H. 228, 230.

New York: *Holmes v. Seely*, 19

Wend. 507; *Simmons v. Sines*, 4 Abb. Dec. 246; *Wheeler v. Gilsey*, 35 How. Pr. 139, 144; *New York L. Ins. Co. v. Milnor*, 1 Barb. Ch. 353; *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. Rep. 966; *Fritz v. Tompkins*, 41 N. Y. Supp. 985.

Pennsylvania: *Wissler v. Hershey*, 23 Pa. St. 333.

South Carolina: *Lawton v. Rivers*, 2 McCord, 445, 15 Am. Dec. 741; *Screven v. Gregorie*, 8 Rich. 158, 64 Am. Dec. 747.

Texas: *Alley v. Carleton*, 29 Tex. 78, 94 Am. Dec. 260.

¹ *Blum v. Weston*, 102 Cal. 362, 36 Pac. Rep. 778.

² *Holmes v. Goring*, 2 Bing. 76, 83.

³ *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *Symmes v. Drew*, 21 Pick. 278.

very right of way that is released. "To imply a reservation of the right of a reasonable way out of the right of way released by that deed, seems absolutely inconsistent with the intention of the parties, as expressed in that deed. As the law does not give to every owner of land a right of way to it, or prohibit an owner from cutting himself off from all access to it by his conveyances, we think that the reservation of a way of necessity cannot be implied in this case."¹

A way of necessity may be extinguished by the opening of a public highway to the land to which such way is attached.² If a public highway is laid out over the route of a private way and is accepted by the party entitled to such way as a substitute for the way of necessity, that ceases. But if the public way is laid out only in part over the private way, and it is not accepted as a substitute therefor by the owner of such way, he is entitled to damages for the land taken for such highway.³

One having a right of way of necessity does not lose it by acquiring other land to which is appurtenant an easement of way over a private alley, by which, and the land acquired, he might reach the lands to which the way of necessity is attached.⁴ The alley is appurtenant to the last named parcel only.

336. A right of way by necessity once existing may cease in consequence of conveyances of either the dominant or servient estate, or of other estates surrounding the dominant estate; or of grants of private rights of way; or of the laying out of public ways; and it may often be as much the duty of the owner of the servient estate, as it is that of the dominant estate, to ascertain when the right of way ceases.⁵ This right is extinguished by the union of the title and possession of the dominant and servient estates in one person; but may be revived and pass with the dominant estate upon a subsequent conveyance of this estate to another.⁶

¹ Richards v. Attleborough Branch R. Co., 153 Mass. 120, 26 N. E. Rep. 418.

⁴ Zell v. Universalist Society, 119 Pa. St. 390, 4 Am. St. Rep. 654.

² Palmer v. Palmer, 71 Hun, 30.

⁵ Ballard v. Demmon, 156 Mass. 449, 31 N. E. Rep. 635, per Field, C. J.;

³ Abbott v. Stewartstown, 47 N. H. 228.

Baker v. Crosby, 9 Gray, 421.

⁶ Brown v. Berry, 6 Cold. 98.

CHAPTER IX.

LOCATION OF WAYS.

Location of Ways, 337-354.

Location of Ways.

337. A right of way not definitely located may be located by the parties by parol agreement anywhere within the boundaries of the land over which the right is granted.¹ The owner of the land over which there is an undefined way by express grant or by implication, has in the first instance the right to locate the way, for the owner of the easement in such case is entitled to a convenient way only, and one which shall be as little as possible inconvenient to the owner of the land. If the owner of the land fails to exercise this right, the person entitled to the right of way may do so.² Until he exercises this right the owner of the land may erect buildings on any part of it, or may alienate any part of it free from the incumbrance of the way, provided he leaves a space on his land sufficient for a convenient way.³

If the grantor does not assign a way, or if he assigns a way that is unreasonable, the grantee may select a way that is convenient for himself, if that will not unreasonably interfere with the grantor in the enjoyment of his estate.⁴ Thus, where the owner of a large farm sells the trees and timber upon it, with privilege to the purchaser to enter upon the lands for the purpose of removing the trees and timber, the purchaser has the right to remove the timber by

¹ *George v. Cox*, 114 Mass. 382; *Jones v. Percival*, 5 Pick. 485, 16 Am. Dec. 415; *Johnson v. Kinnicutt*, 2 Cush. 153; *Bannon v. Angier*, 2 Allen, 128; *French v. Hayes*, 43 N. H. 30, 80 Am. Dec. 127; *Cheswell v. Chapman*, 38 N. H. 14, 75 Am. Dec. 158; *Onthank v. Lake Shore, etc., R. Co.*, 71 N. Y. 190, 27 Am. Rep. 35; *Wynkoop v. Burger*, 12 Johns. 222; *Warner v. Railroad Co.*, 39 Ohio St. 70, 72; *Kinney v. Hooker*, 65 Vt. 333, 26 Atl. Rep. 690.

² *Russell v. Jackson*, 2 Pick. 574; *Chase v. Perry*, 132 Mass. 582; *Holmes v. Seely*, 19 Wend. 507; *Capers v. Wilson*, 3 McCord, 170.

³ *Russell v. Jackson*, 2 Pick. 574.

⁴ *George v. Cox*, 114 Mass. 382; *Johnson v. Kinnicutt*, 2 Cush. 153; *Stephens v. Gordon*, 22 Can. Sup. Ct. 61; *Gardner v. Webster*, 64 N. H. 520, 15 Atl. Rep. 144; *Corliss v. Dunning*, 8 Wash. 332, 35 Pac. Rep. 1074; *Kinney v. Hooker*, 65 Vt. 333, 26 Atl. Rep. 690.

the most direct and available route, provided he acts in good faith and with a reasonable regard to the grantor's interests.

338. In determining the location of a private way not defined by the deed creating it, parol evidence showing the topography of the premises, the comparative benefit or injury to each party of any proposed location, and such other facts as may enable the court to read the grant or reservation by the light under which the parties made it, is admissible.¹ Thus, where the owner of two lots of land conveys one of them subject to and entitled to the common use of a passage-way from the street "about three feet and ten inches wide on the southeasterly side of the land granted," evidence that when the deed was made the only passage-way on or adjoining the land granted, was a passage-way partly on each lot and three feet and ten inches wide between the houses built on the two lots, identifies the passage-way as that mentioned in the deed, and a subsequent grantee of the other lot has no right to obstruct it.²

The owner of two lots of land conveyed the corner lot and afterwards conveyed the adjoining lot, with the right of way of an alley ten feet wide at the rear of the lot. It appearing that a passage-way actually existed from a side street in the rear of both lots, which was under the grantor's control, it was held that the easement was not limited to a mere open space behind the lot, but was a way through to the street. "The grant must be construed in the light of this fact, and this makes clear what the alley was the parties had in mind, and shows that it was one useful, if not necessary, to the proper and full enjoyment of the land conveyed."³

339. A right of way reserved, but not particularly defined, need be only such as is reasonably necessary and convenient for the purpose for which it was created. One owning land on the corner of two streets built thereon four houses fronting on one of the streets, with a stable in the rear of each, leaving an alley-way from the side street to the stables. He subsequently sold the corner lot, reserving "the right of way through and over the carriage or alley-way" to the stables, so long as they should be occupied as private stables. The purchaser built over the alley-way a brick building resting on

¹ Gardner v. Webster, 64 N. H. 520, Mass. 211; Stetson v. Curtis, 119 Mass. 15 Atl. Rep. 144; McConnell v. Rathbun 46 Mich. 303, 9 N. W. Rep. 426; ² O'Brien v. Schayer, 124 Mass. 211. McFerren v. Mont Alto Iron Co., 76 Pa. St. 180; O'Brien v. Schayer, 124 303, 306, 9 N. W. Rep. 426, per Cooley, J.

iron girders, supported by walls on either side. It appeared that the carriage-way was left as convenient for the purposes for which it was reserved as it was before this building was erected. It was held that as the purchaser's deed vested in him all the rights of absolute ownership, except as restricted by the reservation, the grantor had no right to claim that the whole alley-way should be left open for his use. Although the alley-way as laid out was eighteen feet wide, the right to pass over every part of eighteen feet was not reserved, inasmuch as the whole width of the alley was not necessary in order to pass and repass in the usual way between the stables and the street.¹

340. If there be an existing way at the time of the grant, the way granted may be defined by the existing route, and not by a convenient way over an undefined route. "A right to pass and repass, if over vacant and unoccupied land, when no way actually exists or is used, would be the grant of a convenient way, the direction and width of which would be determined by various circumstances. But similar words being used, in regard to a place over which a way is already fixed by buildings or permanent enclosures, would be construed to be a grant of the way thus located, fixed and defined. Such a construction is necessary to the security of both parties. To the grantee, to insure him a way of known width and direction, the sufficiency of which he may judge of before he closes his contract for the purchase; and to the grantor, to secure himself against the claim of the grantee to an indefinite right to pass over his premises, in any direction, at the election of the grantee."² Accordingly where a right was given to pass through Central court, a place which had been laid out and was known by that name, it was held that the term Central court might be construed as including all the space that had been laid out, paved and fitted for use, and that the grant was of a way, limited and defined, and not of a convenient way to be subsequently defined.

But where one owning land through which was an open space of irregular width varying from forty-eight to fifty-three feet, bounded on its sides by trees, fences and buildings, extending from the highway back to other lands of the grantor, and was used for access to those lands, conveyed one parcel of them by a deed which provided that a carriage-way, at least twenty-five feet wide,

¹ Grafton v. Moir, 130 N. Y. 465, 29 N. E. Rep. 974.

² Salisbury v. Andrews, 19 Pick. 250, 258, per Shaw, C. J.

shall be kept open from such parcel, to the highway, it was held, that the grantee was not necessarily entitled to a way over the space mentioned, which was forty-five feet or more in width. It was not consistent with the terms of the deed which provided for a way at least twenty-five feet wide, to suppose that the grantor intended to devote the whole of the forty-five feet in width to the use of the proposed way, even if the whole was then used as a way for access to his other land. He has performed his contract if he keeps open a way of the width described in the deed. Even an acquiescence in the use of the existing way by the grantee will not be permitted to defeat the intention expressed in the deed.¹

341. A way reserved is not always an existing way. A grantor reserved the right of crossing and recrossing the land conveyed "for all necessary purposes in quarrying and carting stone and all other products from my adjoining land." Both the land conveyed to the grantee, and the land retained by the grantor were intended to be used for quarrying purposes, and were continuously so used. At the time of the conveyance, there were several cart-ways over the land conveyed, but no particular route was specified in the reservation of the right of way. It was held that the grantee was not obliged to maintain any of the cart-ways existing at the time of the conveyance, but the grantor was only obliged to provide the grantee with a reasonably convenient way across the land; the exigencies of operating quarries on such land requiring the way across it to be changed from time to time. It was argued that the intention of the parties would be best carried out by regarding the general terms used as meaning only the ways existing at the time of the conveyance. "But is it not more natural to suppose, in view of the fact that the reservation was made in such general terms, although there were several cart-paths in existence, and in further view of the known temporary character of such paths, and the custom of changing them from time to time, to meet the exigencies of the quarrying business, that it was the intention of the parties not to limit the crossing and recrossing to any particular place, but to leave it where, all things considered, it was natural and fair to leave it, so that the plaintiff would be reasonably inconvenienced without depriving the defendants of the use of the most valuable portion of the land

¹ Stetson v. Curtis, 119 Mass. 266.

for quarrying purposes, and subjecting them to great loss, as the court below finds that the construction insisted upon by the plaintiff would do ? ”¹

342. A practical location of a right of way granted or reserved serves to define it when the description is indefinite or in general terms. A general description of a right of way is sufficient in case there was a clearly defined way at the time of the conveyance.² There may be a presumption that an existing way which fulfils the terms of the description is the way intended by the parties, but this is not necessarily the way granted or reserved. A reasonably convenient way is intended, and the owner of the servient estate may provide such a way in a different location from the way that had previously been used.³

343. Acquiescence of the owner of the servient estate in the use of a particular location of the way operates as an assignment of the way.⁴ When a way is thus located by use, and is once fully established, neither party can change the location without the consent of the other.⁵ If the grantor afterwards obstructs such way, he is liable to an action therefor, and cannot defend by showing that the grantee may have a different location, although this may be equally convenient with the way located by use.⁶

Where a landowner granted to a railroad company the right to select a strip of land a hundred feet in width, over his land, on the line of the company's road for a right of way, it is clear that both parties understood the right granted was to be exercised at the time of the final location and construction of the railroad, and not afterwards; and a court of equity will, by injunction, restrain such rail-

¹ *Colt v. Redfield*, 59 Conn. 427, 22 Atl. Rep. 426, per Seymour, J.

² *Wells v. Tolman*, 34 N. Y. Supp. 840; *Onthank v. Lake Shore & M. S. R. Co.*, 71 N. Y. 194, 27 Am. Rep. 35; *Cheswell v. Chapman*, 38 N. H. 14, 75 Am. Dec. 158; *Wharton v. Hannon*, 101 Ala. 554, 14 So. Rep. 630.

³ *Gardner v. Webster*, 64 N. H. 520, 15 Atl. Rep. 144; *Smith v. Wiggin*, 52 N. H. 112; *Johnson v. Kinnicutt*, 2 Cush. 153.

⁴ *Green v. Goff*, 153 Ill. 534, 39 N. E. Rep. 975; *Bannon v. Angier*, 2 Allen,

128; *George v. Cox*, 114 Mass. 382; *Wynkoop v. Burger*, 12 Johns. 222; *Corliss v. Dunning*, 8 Wash. 332, 35 Pac. Rep. 1074.

⁵ *Bannon v. Angier*, 2 Allen, 128; *Jennison v. Walker*, 11 Gray, 423, 426; *Marsh v. Haverhill Aqueduct Co.*, 134 Mass. 106; *Jones v. Percival*, 5 Pick. 485, 487, 16 Am. Dec. 415; *Karmuller v. Krotz*, 18 Iowa, 352; *Wynkoop v. Burger*, 12 Johns. 222; *Garraty v. Duffy*, 7 R. I. 476; *Kraut's App.* 71 Pa. St. 64.

⁶ *Bannon v. Angier*, 2 Allen, 128.

road company from taking possession of any additional part of said land, after its railroad has been located and completed.¹

Where a way is provided for over or near an existing lane, and purchasers have used such lane for a long time, there is a sufficient dedication of it to their use and acceptance by them, and no change of the location of the way can be made without their consent. "There is no doubt that the foregoing language, though uncertain as to the precise location, is sufficient to dedicate a pass-way, if the same is accepted by the parties concerned. If not accepted, it would be regarded as a mere proposition to remain open only for a reasonable time, which would be considered impliedly withdrawn after the lapse of a reasonable time, without the acceptance having been made, which acceptance need not be evidenced by any formal act, but a use of it, as a matter of right, would be sufficient evidence of such acceptance."²

In case the way is not located by either party except by the use of it by the party entitled to the way, and it appears that he has for several years passed over the land without confining himself to a specific path, but by going in the same general direction without any considerable deviation, it seems that these facts amount either to an agreement or a license that the privilege of passing and repassing may be exercised within limits broader than an ordinary footpath, and that he should be deemed to be within the limits of his right if he did not depart altogether from the direct line from the road to the land to which the way is attached.³

344. A way may be located by use for a short time; as, for instance, where the way was granted over the south part of a lot of land and there was at the time of the conveyance a way which had been in use, and was traceable on the land, and this was used by the party entitled to it for more than two years after the conveyance, the location is fixed as to him and he cannot change it.⁴ Mr. Justice Bigelow states the principle of law in a Massachusetts case, saying: "Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised cannot

¹ Warner v. Railroad Co., 39 Ohio 513, 19 N. W. Rep. 257. And see Colt v. Redfield, 59 Conn. 427, 22 Atl. Rep.

² Wickliffe v. Magruder (Ky.) 13 S. 426.

³ W. Rep. 523.

⁴ Roberts v. Stephens, 40 Ill. App. 507, 138.

be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and definite course, with the full acquiescence of both parties, it cannot be changed at the pleasure of the grantee."¹

Where one conveyed a lot of land with a passage for a certain purpose over his "remaining ground," part of which was then vacant, and part of which was occupied by a house in which the grantor lived, and he soon afterwards conveyed the vacant ground to another without any reservation of a passage over it, and then opened a passage through his house, in order to provide a passage as agreed for his first grantee, who used the same on two occasions, it was held that the grantor's heirs were bound by this location of the passage and could be restrained from obstructing it. The presumption, arising from the grantor's conveyance of the vacant land, with warranty, was that this land should be discharged from the easement, which might naturally attach to it under the grant, and that the passage should be located on the grantor's premises occupied by his house; and this presumption was confirmed by the actual location of the passage through the house.²

345. If a right of way has been located by the parties and used for many years without objection, the party entitled to the easement is entitled to this way, and the owner of the servient estate cannot change the location of the way without the consent of the party entitled to use it. Thus a right of way from the land of the grantee to a public road was by the terms of the grant to be "on or near" a certain boundary line. After the way had been located by the grantor and used by the grantee for many years, a re-survey of the land established this boundary line about three rods from the line where the parties supposed it to be. The grantor obstructed the way that had been used, in order to compel the grantee to follow the route nearer to the boundary line established by the survey. It was held that the grantee was entitled to a right of way as established and also over the said three rods by the shortest practicable route to the existing way.³

¹ Jennison v. Walker, 11 Gray, 423, 426, approved in Onthank v. Lake Shore & Mich. So. R. Co., 71 N. Y. 194, and in Hines v. Hamburger, 43 N. Y. Supp.

² Kraut's Appeal, 71 Pa. St. 64.

³ Fritsche v. Fritsche, 77 Wis. 266, 45 N. W. Rep. 1088.

The owner of a servient estate, by joining with the owner of the dominant estate in building a line fence up to a road, selects such road as the one that must be used.¹

346. In case a right of way is so indefinitely described that two locations will answer the description, that one will be adopted which a reasonable construction of the deed requires, with a view to the rights of both parties, and to the cost and practicability of construction. If in such case, one route is much longer than the other, and can be made fit for use only by a large expenditure, the shorter and least expensive route should be adopted.²

If a particular way is plainly conveyed by the terms of the deed, it is not competent to prove by parol that it was not the intention of the parties that it should be conveyed.³

It may be shown, however, that the parties intended the description to apply to one of the two ways, and for this purpose evidence of the declarations of the parties made at or about the time of the conveyance is admissible.⁴

Where one reserved a right of way over the granted land without fixing its locality and at the time of the conveyance there were two ways in use, one of which was afterwards closed with the consent of the parties, the grantor was entitled to use the remaining way; and although the grantee in such case might in the first instance designate the locality of the way, he has no right to build a fence across the only path where a way is practicable.⁵

347. Parol evidence is not admissible to show the intention of the parties as to the location of a way, where the terms of the deed are not ambiguous. Thus, under a grant of a right of way across a lot of land, parol evidence is not admissible to show that it was the intention of the parties that the grantee might enter at one place, go partly across, and then come out at another place on the same side of the lot.⁶ “Parol evidence is not admissible to show intention of the parties, except when two subjects are equally within the

¹ Fritz v. Tompkins, 41 N. Y. Supp. 985.

² McCormack v. Crow (Ky.) 15 S. W. Rep. 181.

³ Shepherd v. Watson, 1 Watts, 35.

⁴ French v. Hayes, 43 N. H. 30, 80 Am. Dec. 127; Osborn v. Wise, 7 Car. & P. 761.

⁵ Bangs v. Parker, 71 Me. 458.

⁶ Comstock v. Van Deusen, 5 Pick. 163.

words; and then parol evidence is receivable to show which of the two the grantor meant to grant.”¹

348. One having a right of way is not justified in going outside the locality of the way, because the way is impassable. It was early settled that the right of going on the adjoining land in case a high-way becomes impassable does not extend to private ways.² “And there may be many reasons in the case of highways,” said Lord Ellenborough, “why the public should have an outlet, because it is for the public good that a passage should be afforded to the subjects at all times. But the same necessity does not exist in the case of a private right. * * * It is a thing founded in grant, and the grantor of a private way does not grant a liberty to break out of it at random over the whole surface of his close. It is established law that the grantee of a private way cannot break out of it.”³

349. The grantee of a right of way which has been obstructed by the grantor has a right to deviate over the grantor's land; and the grantee is entitled to have this right protected by the court so long as the obstruction exists, without the necessity of proceeding against the grantor for the removal of the obstruction.⁴

350. A right of access to a private way over the grantor's land “to and from every or any of the parcels” conveyed to the grantee gives him a right to come out upon such way at any point at which he can get access to it, although only one particular line of access has been made and used during a long period; and it gives him a right to cross a narrow strip of land belonging to the grantor which intervenes between the way and the grantee's land where his land did not border upon the way. The fact that the grantee or his successors have run a fence along their boundary and only opened one gate in it at the point where such access had been enjoyed, is no proof of an intention to abandon their right to access at any point.⁵

351. Under a grant of a right of way across the grantor's land, the grantee has no right to enter at one place, go partly across, and then come out at another place on the same side of the lot; and

¹ Osborn v. Wise, 7 Car. & P. 761, 766, per Parke, B.

² Taylor v. Whitehead, 2 Dougl. 744, 749. See also Pomfret v. Ricroft, 1 Saund. 323, n. 6. See § 333.

³ Bullard v. Harrison, 4 M. & S. 387,

393; Williams v. Safford, 7 Barb. 309; Capers v. M'Kee, 1 Strob. 164, 168.

⁴ Selby v. Nettleford, 9 Ch. App. 111.

⁵ Cooke v. Ingram, 3 Reports (1893), 607.

parol evidence to show that such was the intention of the grant is inadmissible.¹

Under a grant of way between two points in, through and along a particular strip of land, the grantee is not justified in making a transverse road across the same.²

352. A way once located cannot be changed by either party without the consent of the other.³ When the right of way has once been exercised in a fixed and definite course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of either of them. Though the grantee of the right may locate the way in the beginning, when he has once fixed the location, he cannot change it. But if a change is made, and both parties either consent to the change or acquiesce in it, the change is effectual. If the grantor of the right makes the change and the grantee uses the new road for a length of time, his acquiescence in the change will be presumed.⁴

Where the land of a railroad company is subject to certain rights of way across its location in favor of the landowner through whose land the road is located, the parties can lawfully adjust the rights and obligations of the two estates by extinguishing all other rights and claims, and establishing one permanent crossing in place of them, and such crossing is not necessarily extinguished by the filing of a location which contains no mention of it.⁵

Where a grantor reserved a right of way in a carriage road across the land conveyed, or, in the event the grantee should change the route of the carriage road, then a right of way in such substituted road, and also reserved a similar right in another road across the land, or in any new road substituted therefor, it was held that the grantee could substitute one new road for the two former roads, if the one be as convenient and beneficial for all the purposes of the grantor as the two would be.⁶

¹ Comstock v. Van Deusen, 5 Pick. 163.

² Senhouse v. Christian, 1 Durn. & E. 560.

³ Jennison v. Walker, 11 Gray, 423; Chandler v. Jamaica Pond Aqueduct Co., 125 Mass. 544, 550; Bannon v. Angier, 2 Allen, 128; Smith v. Lee, 14 Gray, 473; Manning v. Port Reading R. Co. (N. J. Eq.) 33 Atl. Rep. 802; Palfrey v. Foster, 47 La. Ann. 939, 17 So. Rep. 425; Keating v. Hayden, 30 Ill.

App. 433; Wysor v. Lake Erie & W. R. Co., 143 Ind. 6, 42 N. E. Rep. 853; Joseph County v. South Bend & M. St. R. Co., 118 Ind. 68, 20 N. E. Rep. 499; Wood v. Michigan Air Line R. Co., 90 Mich. 334, 51 N. W. Rep. 263.

⁴ Wynkoop v. Burger, 12 Johns. 222; Smith v. Lee, 14 Gray, 473.

⁵ Hamlin v. New York, N. H. & H. R. Co., 166 Mass. 462, 44 N. E. Rep. 444.

⁶ Lyon v. Lea, 84 Me. 254, 24 Atl. Rep. 844. "It is hardly to be supposed

353. When a new way is substituted for an old one by the consent of the owners of both estates, the new way rests on no better title than the old way and if the right to the original way was unfounded, the party claiming the easement obtains no irrevocable right to use the new way.¹

A grant of a right to use a strip of land of a width defined for a right of way does not restrict the grantee to the track as at first constructed, but he may change its location to any part of the strip specified in the grant.²

354. If the parties cannot agree upon the location of the undefined way, this may be determined in equity.³

The complaint in an action to establish a right of way and to enjoin its obstruction must contain a description of the land over which it is claimed, and its omission is not cured by reference to so-called "exhibits," as parts of the complaint, containing descriptions of the land.⁴

A right of way that is too indefinite for a determinate description, cannot be established and protected by a court of chancery.⁵

A purchaser of land to which a right of way has been made appurtenant, acquires the right, though it is not mentioned in the deed or conveyance.⁶ But such purchaser acquires only such right of way as was conveyed to the original grantee or was located and used by him.⁷ If the right of way was not located by the original grant, and the grantee never claimed any right of way under the grant, and such right of way has never been denied to a subsequent purchaser, he cannot maintain a bill in equity to establish the way.⁸

that the grantor would be willing to maintain and keep in repair two roads across the grantee's land, and we do not see that the burden is cast upon the grantee to keep such roads or any road in repair for him. As it now is, however, the new substituted road, to be spoken of, will necessarily be kept in repair by the grantee, as it leads to and past his own expensive structures upon the purchased property; and this is an element of consideration in an endeavor to ascertain the intention of the parties as to the reservations in the deed." Per Peters, C. J.

¹ Atwater v. Bodfish, 11 Gray, 150.

² Greenwood Lake & P. J. R. Co. v.

New York & G. L. R. Co., 28 N. Y. St. Rep. 739, 8 N. Y. Supp. 26.

³ Gardner v. Webster, 64 N. H. 520, 522, 15 Atl. Rep. 144; White v. Eagle & P. Hotel Co., (N. H.), 34 Atl. Rep. 672, per Carpenter, J.

⁴ Price v. Bayless, 131 Ind. 437, 31 N. E. Rep. 88; Fox v. Pierce, 50 Mich. 500, 15 N. W. Rep. 880.

⁵ Fox v. Pierce, 50 Mich. 500, 15 N. W. Rep. 880.

⁶ §§ 18-32; Kinney v. Hooker, 65 Vt. 333, 26 Atl. Rep. 690.

⁷ Kinney v. Hooker, 65 Vt. 333, 26 Atl. Rep. 690.

⁸ Kinney v. Hooker, 65 Vt. 333, 26 Atl. Rep. 690.

CHAPTER X.

LIMITATION OF WAYS.

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| <p>I. By express terms of grant, 355-359.</p> <p>II. Appurtenant to particular land, 360-363.</p> <p>III. As to width, extent and time, 364-370.</p> | <p>IV. To previous use, 371-372.</p> <p>V. Unrestricted grants, 373-381.</p> <p>VI. Implied limitations, 382-388.</p> <p>VII. Construed by acts of parties, 389-390.</p> |
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I. By express Terms of Grant.

355. One granting an easement may limit the grant, and the grantee takes it subject to the restrictions imposed, and cannot enlarge or abuse his privilege.¹ The limitation may be with reference to the purpose for which the easement may be used, as, for instance, a right of way may be granted for agricultural purposes only, or for mining purposes; or with reference to its use, as a footway, as a carriage road, or as a way for cattle.

A grant of a dwelling-house and field, with a right of way to the dwelling-house, does not give the grantee any right of way to the field.² A grant of a way to a cottage, consisting of one room, does not justify the grantee in claiming to use the way for access to a town he may build at the end of it.³

A grant or reservation of a right of way "for the purpose of carting wood, etc.," is limited to the purpose of carting wood and is not enlarged by the abbreviation, etc.⁴

A right of way from a dwelling to a wood-house gives no right of way to a barn not connected with the wood-house.⁵

356. A grant or reservation of a carriage-way or alley-way to a stable does not confer a right of way for all purposes, but only a way to and from the stable. It is only a way that affords a con-

¹ Jackson v. Stacey, Holt, N. P. 455, Ballard v. Dyson, 1 Taunt. 279; Brunton v. Hall, 1 Q. B. 792; Davenport v. Lamson, 21 Pick. 72; Comstock v. Sharp (Mich.) 64 N. W. Rep. 22; Shroder v. Brenneman, 23 Pa. St. 348; Valley Falls Co. v. Dolan, 9 R. I. 489; French v.

Marstin, 24 N. H. 440, 57 Am. Dec. 294; Abbott v. Butler, 59 N. H. 317.

² Henning v. Burnet, 8 Exc. 187.

³ South Metropolitan Cem. Co. v. Eden, 16 C. B. 42, 57, per Jervis, C. J.

⁴ Myers v. Dunn, 49 Conn. 71.

⁵ Valley Falls Co. v. Dolan, 9 R. I. 489.

venient access to the stable in the usual mode of enjoying such a right. "If the alley itself had been reserved, or the right to use it for every purpose, a different question would have arisen; but neither the alley nor the alley-way was reserved, nor anything except the right of way over the alley-way or carriage-way. The language of the reservation confers upon the plaintiff simply the right of passage, and, as incidental thereto, such light and air as are necessary to the convenient enjoyment of that right. There is no provision which expressly or impliedly requires that the entire space at the rear of defendant's building shall be kept open forever, so that the plaintiff's stables may have air and light. A right of way to a stable does not carry with it such light and air as the stable needs, but such as the right of way needs for its reasonable enjoyment."¹

Where a right of way was granted over a close "to the stable and loft over the same, and the space and opening under the said loft used as a wood-house," it was held that the right should be "confined to the use of the way to a place which should be in the same predicament as it was at the time of making the deed." It was not considered that the right of way depended on the space being used as a wood-house, but it was said it must be used "for purposes which were compatible with the ground being open, and that, if any buildings were erected upon it, it was no longer to be considered as open for the purpose of this deed."² Baron Parke, referring to this decision, said: "a more strict rule was laid down than I should have been disposed to adopt, for it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of making the deed. No doubt if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered."³

But a reservation of a way from a road over the granted land to a barn standing on the adjoining lot, described as the grantor's dwelling-house lot, is a reservation of a right of way to the dwelling-house lot for such purposes as a way to the barn appurtenant to

¹ *Grafton v. Moir*, 130 N. Y. 465, 472, 29 N. E. Rep. 974, per Vann, J.

² *Allan v. Gomme*, 11 Ad. & E. 759, 772.

³ *Henning v. Burnet*, 8 Exc. 187, 192.

the dwelling-house might properly be used, and it is not lost by the destruction of the barn standing thereon at the time of the reservation.¹

357. A right of way granted for a carriage road to a gentleman's country seat, cannot be properly used by the grantor for carrying heavy loads of farm produce over it, thus injuring the road for the use for which it was granted. "No inference can be drawn from the present grant that it was intended that the grantor should enjoy the unrestricted use of the road, with the privilege of so wearing and using it as to subject the grantee to the labor and expense of keeping it in repair. It is apparent, from the character of the property affected and the use to be made thereof, that the plaintiff expected to construct a carriage road for access to and communication with his residence as a gentleman's country seat. It could not have been contemplated by the parties that such a road was to be used for farming purposes, to draw heavy loads over, and cut it up by the use of the various appliances needed for such purposes."²

358. A grant or reservation of a right of way cannot be extended beyond its terms. Where a city in a deed to a railroad company reserved the right to cross the tracks of the company with its streets and alleys, when the city should make an addition of certain land, the reservation did not become operative until such addition has been made.³

A grant or reservation of a crossing or wagon-road over the track of a railroad is a grant or reservation only of a right of passage over the surface of the railroad, with a right to repair the crossing.

¹ *Bangs v. Parker*, 71 Me. 458. "Our construction of the language of this clause is, that it contains a reservation of a right of way to the dwelling house lot, for such purposes as a way to the barn appurtenant to the dwelling-house might properly be used, or was accustomed to be used. It is not merely a way to a barn, but to a barn standing upon a dwelling-house lot; to a building which is itself an appurtenance of the dwelling-house. The dwelling-house is the principal thing, for the benefit of which the way is reserved, although it is limited to the specific

uses to which a way to the barn attached to the house would properly be assigned. The way was a means of access to the lot for whatever purposes a passage-way, appurtenant to a barn standing on the lot, would naturally and ordinarily be used. We think the right was not lost by the destruction of the building." Per Symonds, J.

² *Herman v. Roberts*, 119 N. Y. 37, 44, 23 N. E. Rep. 442, per Ruger, C. J.

³ *Fort Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558, 32 N. E. Rep. 215.

It confers no right to construct a subway under the crossing for pipes to be used for conveying oil.¹

359. An abutting owner may grant an easement in the street in addition to its use as a highway ; but such a grant does not confer any easement in his land outside the limits of the street. Thus, if he grants to a street railway company the right to construct and operate a double-track road upon either side of the roadway, the company has no right to locate its tracks outside the line of the street, although the street has been washed away by the action of the river, so as to be moved back towards his land and no room is left for the tracks as designated. His grant was merely his consent to impose an additional burden upon the land constituting the street.²

Where the owner of land granted a right of way to a gas company, and, by a supplementary agreement, granted a greater width for the right of way, the company agreeing to lay its pipes two feet below the surface of the ground, it was held that the latter stipulation was not an independent collateral agreement, and that the landowner might enjoin the company from placing its pipes upon the surface of the ground.³

II. *Appurtenant to Particular Land.*

360. One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached, although such other land is within the same enclosure with that to which the easement belongs.⁴ Except for this rule the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate. This rule is, therefore, applicable whether the way was created by grant, reservation, prescription or as a way of necessity. In either case, the way is created by grant, either express, presumed or implied. The way is granted for the benefit of the particular land, and its use is limited to such land. Its use cannot be extended to other land, nor can

¹ Breckinridge v. Delaware, L. & W. R. Co. (N. J. Eq.) 33 Atl. Rep. 800.

² Curvin v. Rochester R. Co., 78 Hun, 555, 61 N. Y. St. Rep. 420, 29 N. Y. Supp. 521.

³ Carothers v. Philadelphia Co., 40 Pitts. Leg. J. 191.

⁴ Albert v. Thomas, 73 Md. 181, 20 Atl. Rep. 912; The Redemptionists v. Wenig, 79 Md. 348 29 Atl. Rep. 667; Davenport v. Lamson, 21 Pick. 72; Greene v. Canny, 137 Mass. 64; Hoosier Stone Co. v. Malott, 130 Ind. 21, 29 N. E. Rep. 412.

the way be converted into a public way without the consent of the owner of the servient estate.¹

One having a right of way to his land Blackacre over land of another, has no right to drive his cattle to Blackacre and then to other land beyond it. In the leading case upon this point it was urged for the owner of the right of way, that when his cattle were at Blackacre he could drive them whither he would. On the other side it was said, that if this were so, he might purchase one hundred or one thousand acres adjoining Blackacre, to which he had a prescriptive way, and so the owner of the soil would lose the benefit of his land; that a prescription presupposed a grant and ought to be continued according to the intent of the original creation. To this the court agreed and gave judgment for the owner of the land.²

Where land was conveyed to one, together with a right of way over a certain new road to certain other roads, and the owner of land adjoining the land conveyed to the grantee, but having no communication with the new road, became a tenant of the grantee's land, and wishing to build on his own land, stacked building materials on the land to which the right of way was attached, using the new road in order to bring them there, and afterwards conveyed these materials from this land to his own land, it was held that, under the circumstances, it was a question for the jury whether the tenant used the way as a way to the leased land, or whether it was a mere colorable use of the way for the purpose of getting to his own land. It was considered that if the tenant had directly used the road in question as a way over the grantor's land under the right given to his grantee to reach his own land beyond, this would have been an excess of the right granted.³

¹ Hoosier Stone Co. v. Malott, 130 Ind. 21, 29 N. W. Rep. 412.

² Howell v. King, 1 Mod. 190, followed in Lawton v. Ward, 1 Ld. Raym. 75; Allan v. Gomme, 11 A. & E. 759, per Lord Denman, C. J.; Skull v. Glenister, 16 C. B. N. S. 81, 105; Colchester v. Roberts, 4 M. & W. 769, 774; Williams v. James L. R., 2 C. P. 577; Finch v. Great Western Ry. Co., L. R. 5 Ex. D. 254, 264; Henning v. Burnet, 8 Ex. 187; Stearns v. Mullen, 4 Gray, 151; Smith v. Porter, 10 Gray, 66; Davenport v. Lamson, 21 Pick. 72; S. 81.

Rexford v. Marquis, 7 Lans. 249, 262; French v. Marstin, 24 N. H. 440, 57 Am. Dec. 294, 32 N. H. 316; Gunson v. Healy, 100 Pa. St. 42; Shroder v. Brenneman, 23 Pa. St. 348; Kirkham v. Sharp, 1 Whart. 323, 29 Am. Dec. 57; Walker v. Gerhard, 9 Phila. 116; Lewis v. Carstairs, 6 Whart. 193; Brightman v. Chapin, 15 R. I. 166, 1 Atl. Rep. 412; Reise v. Enos, 76 Wis. 634, 45 N. W. Rep. 414, 8 L. R. A. 617; Springer v. McIntyre, 9 W. Va. 196.

³ Skull v. Glenister, 16 C. B. N.

361. An easement of way made appurtenant to land abutting upon it cannot be enlarged for the benefit of the land not abutting upon it. An alley was laid originally four feet wide, for the use of the properties abutting upon it; subsequently the grantor, who owned a tract of land partly abutting on the said alley, conveyed the part of the land not abutting upon the alley, and, at the same time, granted the right to the use of the alley, which he had widened to ten feet by adding six feet of his own land thereto. It was held that the grantee acquired no title to the use of the alley four feet wide originally laid out.¹

By the division of a farm one part owner became entitled to a right of way as appurtenant to a three-acre lot. This owner also acquired another lot of nine acres, adjoining to and beyond the three-acre lot, by another title. Between these two lots there were no fences, and being mowing land, the grass was cut and the hay made on both, without regard to the dividing line; the hay laid in windrows across both and a load of hay taken partly from one and partly from the other was driven over the way acquired in the division, passing last from the three-acre lot. It was held that such owner had no right to use the way as a way from the nine-acre lot. Taking the hay from both lots indiscriminately was, in effect, making use of the way as a way to and from the nine-acre lot, though the cart passed last from the three-acre lot, and such use was beyond the limit of the right reserved, and *trespass quare clausum* would lie for the abuse of the right.²

If the owner of a parcel of land lays out an alley in the rear of it to a street, divides the land into lots and sells the lots to different purchasers, giving each a right of way in the alley, imposing upon each the duty of keeping a proportionate part of the way in repair, a purchaser of one of the lots has no right to purchase other land adjoining such way and use it for access to such other land. "It cannot be important that the grantor does not state in terms that he lays out the way solely for these lots, or that he does not by express words exclude any others from the benefits thereof. When he states that he lays it out for these lots, delineates it upon the plan, by which it appears that to some of them there was no access except by means of the way, and assesses upon them the whole expense of the maintenance

¹ Academy of Music v. Weldon,

² Davenport v. Lamson, 21 Pick.

2 Pa. Dist. R. 422, 32 W. N. C. 307.

72.

of the way and drain, it must be inferred that the way and drain are to be maintained solely for the benefit of the parties interested therein, each for the other; that the owners are not to be subjected to the additional burdens which would be imposed upon them if others could obtain rights of way or drainage therein; that with the sale of these lots the scheme of the grantor is complete; and that he cannot convey to others such rights in the way."¹

362. Rights of way granted or reserved are appurtenant to the dominant tenement. One who conveys land, reserving certain ways upon which the granted land bounded as common passage-ways, open to all persons having a right to enter upon the same, acquires rights of way appurtenant to his land. The grantee also acquires an implied right to use the ways, which right is appurtenant to every portion of the land conveyed.² Where the owner of the land adjoining a highway conveyed a part of it, excepting and reserving a right of way extending from the highway along the line of division between the part sold and that retained, for a distance less than the whole depth of the lot, the right of way was held to be appurtenant to grantor's remaining land.³

Where one has by prescription a right of way appurtenant to a certain field, the mere fact that he used the way for the purpose of carting from that field some hay stacked there which had been grown partly on that field and partly on other land adjoining, did not make the carrying of the hay over such way an excess in the user of the right of way, the jury having found that in so doing he had used the way in good faith and for the ordinary and reasonable use of the field to which the right of way was attached.⁴

A grant of coal in certain land with "the free and uninterrupted right of way for the purpose of digging, mining and carrying away the said coal," confers no right to take over such land coal from an adjoining tract owned by the grantee. The fact that both tracts were formerly owned by one person, who used a visible road or way over the surface of the coal conveyed to transport coal from the other tract, does not entitle the grantee in the deed to such right of way. The grant expressly limits the right of way to the use of

¹ *Greene v. Canny*, 137 Mass. 64, 67, *Calhane*, 113 Mass. 423; *Fox v. Union per Devens*, J. *Sugar Refinery*, 109 Mass. 292.

² *Boland v. St. John's Schools*, 163 Mass. 229, 39 N. E. Rep. 1035; *Goss v.* ³ *Dennis v. Wilson*, 107 Mass. 591.

⁴ *Williams v. James L. R.*, 2 C. P. 577.

mining and carrying away the coal from the tract conveyed to the grantee.¹

363. A right of way may be expressly granted or demised, not only for the benefit of the land granted or demised, but for the benefit of some other estate. Thus where a lease was made of certain mines with sufficient railways and other ways to carry away the product of the mines demised, or any other mines, it was held that the lessees, by virtue of this clause, might lay down a railway for the carriage of coals raised by them from the pits of adjoining collieries worked by them, and that they were not restricted to using the railway for the carriage of coals raised by or through the pits of the mines demised to them by the above-mentioned lease.²

A grant of a right of way to lay a railroad track to certain quarries in order to transport their products to market, does not authorize the laying of a railroad track which is part of a long line of an ordinary commercial railroad for general business, not going to the quarries but passing at a distance.³

III. *As to Width, Extent and Time.*

364. A right of way without fixed limits is a suitable and convenient way. In such case the way may be narrowed in one place and widened in another by the owner of the servient estate, provided the way, on the whole, is made as convenient as it was before such alterations. But a right of way defined in width and with fixed limits cannot be changed without the consent of the owner of the right. “A right to pass and repass, if over vacant and unoccupied land, when no way actually exists or is used, would be the grant of a convenient way, the direction and width of which would be determined by various circumstances. But similar words being used in regard to a place over which a way is already fixed by buildings or permanent enclosures, would be construed to be a grant of the way thus located, fixed and defined. Such a construction is necessary to the security of both parties.”⁴

Where a building was conveyed with a “common passage-way for

¹ Webber v. Vogel, 159 Pa. St. 235, 28 Atl. Rep. 226, 34 W. N. C. 71.

² Bidder v. North Staffordshire Ry. Co., 4 Q. B. D. 412; Durham & S. Ry. Co. v. Walker, 2 Q. B. 940, 967.

³ Shoemaker v. Cedar Rapids I. F. &

N. W. Ry. Co., 45 Minn. 366, 48 N. W. Rep. 491; Louisville, N. A. & C. R. Co. v. Malott, 135 Ind. 113, 57 Am. & Eng. R. Cas. 278, 34 N. E. Rep. 709.

⁴ Salisbury v. Andrews, 19 Pick. 250, 258, per Shaw, C. J.

all necessary and household purposes," to the rear of it, of the width of a "common cartway," though it appeared in proof that an ordinary cartway is of the width of twelve feet, it was held that the grantee was not necessarily restricted to a passway of twelve feet in width only. The language of the deed must be construed with reference to the nature and condition of the property granted at the time the instrument was executed, and to the obvious purpose the parties had in view. The way must be of such a width as to be of practical use to the grantee. "What would be sufficient for a common cartway on a straight line, might not be in case of a way with sharp angles and curves, as more space would be required in turning the angles and curves than in passing on a straight line. * * * It becomes then a question of fact whether the orator has such convenient space left open and unobstructed for that purpose."¹

365. Where land is conveyed bounded upon a street or way of a width mentioned or shown by a map or plan the grantee has a right to have the street of the width mentioned remain open and unobstructed.²

And so where the owner of land lays off an alley through, or extending into, such land, and designates its boundaries and extent by substantial fences, and conveys lots bordering upon such alley with an express grant of a right of way for egress and ingress through such alley, the rights of the purchasers will be presumed to extend to the limits of the alley thus designated.³

Where a deed was made of land bounded on a street, which appeared by a plan referred to in the deed and exhibited at the sale, to be seventy feet wide, though in the deed the street was described as a forty-foot street, it was held that the deed operated to give the grantee the right to have a way kept open to the width of seventy feet.⁴

A grant of "right of way with horses, carts, carriages and other vehicles over a street forty feet wide," and so situated that there is

¹ Walker v. Pierce, 38 Vt. 94, 98, per Peck, J.

² Haight v. Littlefield, 71 Hun, 285, 24 N. Y. S. 1097; Goss v. Calhane, 113 Mass. 423; Gerrish v. Shattuck, 128 Mass. 571; Randall v. Chase, 133 Mass. 210; Tucker v. Howard, 128 Mass. 361, 122 Mass. 529; Nash v. New England L. Ins. Co., 127 Mass. 91; White v. Tide Water Oil Co., 50 N. J. Eq. 1, 7,

25 Atl. Rep. 199; Methodist Epis. Church v. Pennsylvania R. Co., 48 N. J. Eq. 452, 22 Atl. Rep. 183.

³ Currier v. Howes, 103 Cal. 431, 37 Pac. Rep. 521.

⁴ Farnsworth v. Taylor, 9 Gray, 162. See also Fox v. Union Sugar Refinery, 109 Mass. 292; Rodgers v. Parker, 9 Gray, 445.

much passing over it, gives a right of way in the entire space of that width. "The grant of such a right is to be construed with reference to the place in which it is created, and the circumstances under which the grant was made. Here a right of way is granted over a street of specified width, in a populous neighborhood, in close proximity to wharves, where vessels load and discharge, and where there is a necessity for the passing and repassing of teams engaged in the transportation of heavy merchandise. The parties to the grant must be presumed to have known and contemplated the necessities and usages incident to a grant of a right of way in such a locality." ¹

366. But if the width of the way is not defined by description, by reference to a map or plan, or by usage, the owner of the fee may contract the width of the way, so long as he does not interfere with its reasonable use for the purposes for which it was granted.² In such case the right of way is of a width convenient for ordinary use, or for use for such purpose as the way was designed.³ It is a question for the jury what is a reasonable and necessary use of the way;⁴ as is also the question of the reasonableness or unreasonableness of an obstruction to it.⁵

A grant of a way bounded on a street named does not amount to a covenant of the existence of a street of the same width as a street of that name, if such a street, though graded, and laid down upon a plan published by a former owner, has since been closed and ploughed up; but only to a covenant of the existence of a way of reasonable width. The law would imply a way from the use of the word "street," but it would be only a way necessary and convenient to accommodate the grantee in the use of the land granted.⁶

367. Where an easement is granted, but not defined, the privilege must be a reasonable one for the purpose for which it was created. Thus, where one sold his store building with the privilege of having

¹ Tudor Ice Company v. Cunningham, 8 Allen. 139, 140, per Bigelow, C. J.

² Clifford v. Hoare, L. R., 9 C. P. 362; Hutton v. Hamboro, 2 Fost. & F. 218; Atkins v. Bordman, 2 Met. 457, 467, 37 Am. Dec. 100; Frank v. Benesch, 74 Md. 58.

³ George v. Cox, 114 Mass. 382.

⁴ Hawkins v. Carbines, 3 H. & N. 914;

Frank v. Benesch, 74 Md. 58; Hutton v. Hamboro, 2 Fost. & F. 218; Johnson v. Kinnicutt, 2 Cush. 153.

⁵ Johnson v. Borson, 77 Wis. 593, 46 N. W. Rep. 815, 20 Am. St. Rep. 146, Whaley v. Jarrett, 69 Wis. 613, 34 N. W. Rep. 727; Baker v. Frick, 45 Md. 337, 24 Am. Rep. 506.

⁶ Walker v. Worcester, 6 Gray, 548.

outside stairs on the grantor's adjoining land, leading to the upper rooms of the store, it was held, that the grantee had a perpetual right of way over such stairway and that the width not being declared, the law implied that it should be of a reasonable width.¹

A right of way to a warehouse used for storing grain and fruit, not defined otherwise than in the purpose for which it is to be used, requires a way proper and reasonable for the ordinary access to the warehouse, and, therefore, a way for teams to go to and from it. Necessarily incident to such right of way are the means to turn around and go out after having gone to the warehouse. But this does not necessarily require sufficient width of way for its entire length to turn about with teams and wagons, nor the most convenient means of doing so at any place. It cannot be said, as a matter of law, that the passage abreast of vehicles of exceptional width, which were used for carrying apples, came within the contemplation of the grant of way, or that the width of it at all points for such purpose was actually or reasonably necessary to the enjoyment of the way granted.²

If a way is granted without defining its width, but the grantee practically locates a way of a certain width with the acquiescence of the grantor, both intending to fix its width, the grant operates as an assignment of a way of that width.³ It is a question of fact for the jury whether the width of the way has thus been established.

If the width has not been thus established, the grantee is entitled to a way of convenient width for all the ordinary uses of free passage to and from the land granted to him.⁴

368. An easement of a right of way is limited to the purpose for which the right was granted. Thus, if a right of way is granted to a stone company from a line of railroad to the company's stone quarry, on land conveyed to it by the grantor, the stone company can use the way only in connection with the land to which the way is appurtenant. The railroad company has no right whatever to use the way except as the agent of the stone company, and for any use of the way for general railroad purposes, the railroad company is liable in damages.⁵

A reservation of "a gate or passageway of about five feet wide

¹ Farrington v. Bundy, 5 Hun, 617.

⁴ George v. Cox, 114 Mass. 382.

² York v. Briggs, 7 N. Y. St. Rep. 124.

⁵ Louisville N. A. & C. Ry. Co. v.

³ George v. Cox, 114 Mass. 382; Ban-
non v. Angier, 2 Allen, 128.

Malott, 135 Ind. 113, 34 N. E. Rep.
709.

leading from the street into the yard " of the estate conveyed, for carrying wood, etc., is not a reservation of a way definitely fixed, but only of a right for a suitable and convenient passage for the purposes indicated. The reservation contains no warranty of width and no words declaring that the grantor should have a way of the width as it then existed. On the contrary, the word " about " indicates that the width was not intended to be definite.¹

The owner of a lot of land, upon which there were two houses with a space of about eight feet between them, conveyed one of them with a right to use a carriage or alley-way between that and his other house, " for ingress and egress," upon the rear of the premises conveyed. Subsequently the other lot was conveyed to one who began the building of a barn on the rear of his lot, within less than three feet of the line of the first purchaser. In an action to restrain the erection of the barn, it was held that the alley or easement reserved did not extend back to the rear of the lots, but only so far back as was necessary to enable the purchaser to get upon his land directly in rear of his house, as it stood at the time it was conveyed to him.²

369. The grant of a use of an alley, already laid out, is a grant of the use of it for its whole extent as it existed at the time of the grant. This includes " the last inch as well as the first inch." ³

Where one conveys a lot of land with a right of way " to and from said lot," through an alley, extending across the rear of the lot, the right of way extends along the whole rear of such lot.⁴

But where a right of way was reserved through the servient estate to a certain boundary line, it was held that the way did not extend along such line after reaching it. The language of the deed and the purpose of the parties seem to be met by giving a right of way to the boundary line mentioned. If a further right of way was

¹ *Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100.

² *Spencer v. Weaver*, 20 Hun, 450, 452. Boardman, J., said: " The object of the grant was to enable plaintiff to get from the road to and upon the rear of his lot back of his house as it then stood. Hence the words " for ingress and egress upon the rear of " plaintiff's premises, by fair construction, gives to plaintiff, in addition to the use of the

alley-way, so much additional right of way over or use of defendant's lot as shall enable plaintiff to get upon the rear of his lot." Cited in *Grafton v. Moir*, 130 N. Y. 465, 471, 29 N. E. Rep. 974.

³ *Bump v. Sanner*, 37 Md. 621; *South Metropolitan Cem. Co. v. Eden*, 16 C. B. 42, 58.

⁴ *Currier v. Howes*, 103 Cal. 431, 37 Pac. Rep. 521.

intended it could have been made clear by the words "and along," in addition to those employed.¹

Where the owner of a corner lot conveyed an adjoining lot with a right of way of an alley on the rear end of the lot conveyed, and at the time of the conveyance there was an alley from the street to the rear of both lots under the grantor's control, it was held that the easement was not limited to a mere open space behind the lot conveyed, but included the alley to the street.²

By a partition between tenants in common, made by commissioners, they described a way to be used in common "as a passage-way six feet wide, along the back of the house." There was no evidence that before the partition there was such a way which had been used as a footway and for carriages, or that the parties had so used the way after the partition. It was shown that the width of teams varies from five and a half to seven feet. It also appeared that the passage-way went by the back door of the house and two feet beyond the cellar door, in both of which the parties had common rights. In the trial court the judge ruled that the passage-way was a footway only, and was not designed for use as a carriage-way, and this ruling was held to be correct.³

370. The duration of a right of way which has been defined by the parties cannot be enlarged by implication. Thus where a deed provided that a purchaser might have the right to use, in common with others as a passage-way, a strip of land lying between the land conveyed and the grantor's other land, so long as the same should be used by the grantor as a pass-way, it was held that no easement was created by implication; and that the pass-way might be closed at the pleasure of the grantor. The deed granted only a conditional use of the passage-way, that is, while the grantor should continue to use it as such. To enable the grantee to maintain a right to use the land as a passage-way he must show that the grantor is still using it for that purpose. It was not necessary for the grantor to give notice to the grantee that he had ceased to use it as a passage-way.⁴

A right of way for logging purposes, granted to one who wished to reach his own land by such way, is not limited in time, because by the same instrument the grantor sold the timber on his land to

¹ Brossart v. Corlett, 27 Iowa, 288, Dillon, C. J., dissenting.

² McConnell v. Rathbun, 46 Mich. 303, 9 N. W. Rep. 426.

³ Perry v. Snow, 165 Mass. 23, 42 N. E. Rep. 117.

⁴ Batchelder v. State Capital Bank, 66 N. H. 386, 22 Atl. Rep. 592.

the grantee with a provision that he should cut and remove the timber within four years, in absence of evidence to show that the two grants were connected with each other.¹

Where a right of way across a farm is restricted to such times as the land is not sown with grain, the owner of the dominant estate has the right to cross at all times when the lot is not in good faith sown with grain in such a way that the use of the roadway would result in substantial injury to the owner of the servient estate.²

IV. *To Previous Use.*

371. Whether a way is limited to the previous use made of it depends upon the terms of the grant. Where in a partition of land passage-ways were reserved for the benefit of the owners of warehouses abutting thereon, "to be used by them in as full and ample a manner as they now are and heretofore have been used and enjoyed," the abutters were not restricted to the use of the ways in the manner in which they had previously been used. Chief Justice Shaw delivered the opinion of the court, saying: "that these words do not prevent the abutter from having a full right of way, for all purposes, with all improvements, not only in the manner before used, but in any other manner of using the same right; and that the words quoted, if they had any operation, were intended to enlarge, and not restrict, the right reserved by the general terms. For instance, if it had before been a mere surface of earth, it might be improved by macadamizing, paving or planking, being limited to the use of the same right in a manner more convenient and beneficial for those having the common right."³

If a passage-way in which an easement is granted be described as three feet wide, "as now laid out," this further limitation will be regarded as referring to some well-marked boundaries recognized by the parties, and, therefore, the erection of gate posts which narrow the passage three inches is an unlawful obstruction.⁴

372. Under a reservation of a right of way over the land conveyed to the grantor's other land "as usually occupied," the grantor has the right to use the way for the purpose of taking away

¹ Robinson v. Crescent City Mill Co., 93 Cal. 316, 28 Pac. Rep. 950.

² Wells v. Tollman, 34 N. Y. Supp. 340.

³ Appleton v. Fullerton, 1 Gray, 186, 193, per Shaw, C. J.

⁴ Welch v. Wilcox, 101 Mass. 162, 100 Am. Dec. 113.

the hay or any other crop that he might raise upon his land referred to, though he had never carried hay across the granted premises, but had used the way for general agricultural purposes. The loads of hay may be limited to loads of usual size and shape. The court say: "The reservation is not expressed with entire precision, but the words, 'as usually occupied,' appear to us to refer to the land to which the right of way is attached, rather than to the way itself. But, however that may be, it seems to be the more reasonable interpretation to consider these words as indicating that the right is to be exercised for the general purposes incident to the cultivation and removal of the crop, rather than as intended to limit in advance the size and shape of the loads to be conveyed."¹

A grant of a dwelling-house and field together with all ways to the dwelling-house, usually enjoyed therewith, extends to the use of the ways existing at the time of the grant, and gives the grantee no right to open a way for driving his cattle over the grantor's land, for that would be to impose a new burden. A way newly created by the grantee cannot be a way usually enjoyed therewith.²

V. *Unrestricted Grants.*

373. A grant of a right of way unrestricted as to purpose is a grant of a way to be used for any purpose whatever. A railway company taking land compulsorily, contracted with the owner to construct level crossings between the two severed portions of the land. The estate consisted of marsh land, and was subject to a statutory prohibition against being built upon. The prohibition afterwards having been removed, the land became applicable, and was used for building purposes. It was held that the right of way over or across the railway gave the owners and occupiers of the land the use of the crossings for all purposes connected with houses or buildings subsequently erected, or to be erected, on the estate, but not so as to obstruct the proper working of the railway.³

374. One having a right of way, granted in general terms, is not confined to the mode of use adopted at the time of the grant. Thus, where a landowner in 1647, sold an estate reserving a right of way to and from a colliery, neither he nor his successors in title were confined to the mode of carriage in vogue at the time of the

¹ Sargent v. Hubbard, 102 Mass. 380, 383, per Ames, J.

³ United Land Co. v. Great Eastern Ry. Co., L. R. 17 Eq. 158.

² Henning v. Burnet, 8 Exch. 187.

reservation, but might construct a railway for the purpose. Of course, at the date of the reservation, such a thing as a railway had never been thought of. When two centuries afterwards it was contended that the proprietor of the colliery was not entitled to make a railway for the purpose of carrying his coal, but was bound to use a wagon drawn by horses for that purpose, it was held, that the reservation entitled the proprietor to adapt the way to the improvements of the age, and that these improvements required that he should use a railway with steam locomotives.¹

A grant, in a deed, of an easement in an alley-way, "for ingress and egress along the alley line of the premises hereby deeded," for a specified distance, "and no more and for no other purpose," does not import a restriction of the use to any particular mode of ingress or egress, such as foot travel on a sidewalk in the alley, although that may have been the mode in use at the time of the grant. "In the general language in which the easement was granted we find no limitation upon the use of the way, in so far as it is for ingress and egress. The easement cannot be extinguished by changes in the uses and occupancy of the defendant's property, by reason of which the passageway may be more frequently used by foot passengers, as well as by horses and vehicles, without importing into the language of the grant a meaning which the words, standing by themselves, do not convey. That we could not do without disregarding a principle of construction which regards everything as passing by a grant which is necessary to its reasonable enjoyment." ²

375. A right of way granted or reserved in general terms may be used for any purpose reasonably necessary for the party entitled to use it.³ The fact that the person entitled to such way has used it for one purpose only for a long series of years does not restrict its use to that purpose only.⁴ The grant being in general terms, it must be construed to include any reasonable use to which the land may be devoted.⁵

¹ Dand v. Kingscote, 6 Mees. & W. 174.

² Arnold v. Fee, 148 N. Y. 214, 218, 42 N. E. Rep. 588, per Gray, J. And see Gillespie v. Weinberg, 148 N. Y. 238, 42 N. E. Rep. 676, affirming 6 Misc. Rep. 302; Grafton v. Moir, 130 N. Y. 465, 470, 29 N. E. Rep. 974; Winston v. Johnson, 42 Minn. 398, 45 N. W. Rep. 958.

³ Watts v. Kelson, L. R. 6 Ch. 166, n; Dand v. Kingscote, 6 M. & W. 174, 199; Senhouse v. Christian, 1 T. R. 560, 569; Abbott v. Butler, 59 N. H. 317; Walker v. Pierce, 38 Vt. 94; Gunson v. Healey, 100 Pa. St. 42.

⁴ Holt v. Sargent, 15 Gray, 97.

⁵ Abbott v. Butler, 59 N. H. 317.

An unrestricted way appurtenant to a parcel of land may be used by any one entitled to any part of such parcel, for any purpose to which such land may from time to time be legitimately applied.¹

If a part of the land to which a way is appurtenant is covered with timber which the owner sells, to be removed by the purchaser, he may confer upon the purchaser the right to use the way.²

376. A right of way may be used for any purpose consistent with the purpose for which it was created. Thus, a right of way over a part of a farm to a wood lot is not restricted in its use to the hauling of wood from such lot, but it may be used for hauling stone or other products of the land.³

If the purposes of the way are not declared, the question as to what use of it is reasonable and proper is for the jury.⁴

377. Whether a way created by grant, reservation or necessity is limited to the use made of the land at the time the easement was created or whether it extends all lawful uses of the land which the owner can make of it is a question upon which there has been some diversity of opinion. The better opinion is, however, that a grantee, in general terms, of a right of way, is not restricted to using the land for purposes for which the way was originally granted. A right of way which was granted to give access to pastures may be used for access to a town subsequently built on them.⁵ A way reserved to a colliery worked by horse power may be used when this is afterwards worked by steam power.⁶

A carriage road and driftway, granted to give access to pastures, were afterwards acquired by a railroad company, may be used for the passage of cattle which had been conveyed over the railway, though such use is much greater than the user at the time of the grant, which was exclusively for agricultural purposes.⁷

Where at the time of a grant of a right of way over a railway, the land to which the grant was appurtenant was used for agricultural purposes, there was not then the least probability that it would ever be used for any other purpose. In progress of time, however, it was found expedient to build on that land. It was

¹ Gunson v. Healy, 100 Pa. St. 42.

⁵ Newcomen v. Coulson, 5 Ch. D. 133.

² Bartlett v. Prescott, 41 N. H. 493.

³ Wells v. Tolman, 34 N. Y. Supp. 840.

⁶ Dand v. Kingscote, 6 M. & W. 174.

⁴ Williams v. James, L. R. 2 C. P.

577; Hawkins v. Carbines, 3 H. & N.

⁷ Finch v. Great Western Ry. Co., 5 Exc. D. 254.

914.

contended, however, by the railway company, that the right of way was only a right of way for the purpose for which the land was used at the time the right was granted. It was held, however, that the right of way was a right for all purposes for which the land could be lawfully used in all time.¹

378. A grant of the exclusive use of a way is very much the same in legal effect as the ownership of the way, and the grantee may use it for any lawful purpose. The owner in fee of a house fronting on a street, and also of a yard and premises in the rear of the house, having a covered passage or gateway leading from the street through the house to the premises in the rear, conveyed the premises in the rear in fee, "together with the exclusive use of the gateway," which was described by its dimensions. It was held that the grantee was entitled, not merely to a right of way through the gateway, but to the use of the gateway for all lawful purposes. Lord Justice Cotton, giving the judgment upon appeal, said: "In my opinion, the use of the gateway is not to be restricted to a use for the purposes of a way. It is called here a gateway, and I have sometimes called it a tunnel, but I would rather call it a passage through this house. It is defined as an existing thing called by that name, and to give the exclusive use of an existing thing, though it may be called a gateway, does not, in my opinion, convey this restriction that it is to be used only for the purpose of a way. It is not to use the right of way through the gateway, but it is 'the exclusive use of the said gateway.' Then we find in the parcels that particular thing called the gateway is described by height, by length and by width. * * * It is said that will be granting a new kind of easement, not known to the law. There would be a difficulty, I think, in granting by way of easement the right to use, not defining it in any way, a gateway or passage. I do not at all think, even if this is a mere grant of easement, it would be right to give it a narrower construction, than if it were a covenant on the part of the grantor that this passage might be used by the grantee for any lawful purpose to which it might be applicable. * * * But it may be, and I think this is probably the true construction of it, that the grant of an exclusive use forever of this passage does convey the property in that passage. Of course, that would give rise to questions which we have not now to decide; but it may be that this is a grant of this

¹ United Land Co. v. Great Eastern Ry. Co., L. R., 17 Eq. 158, L. R., 10 Ch. 586.

portion of the house, just as there might be a grant of a set of chambers, which would give a right to the chambers with certain restrictions to the use of the walls, the ceiling and the floor.”¹

379. A grant of a way not exclusive in terms leaves in the grantor and his assigns the right to use the way in common with the grantee, unless such use of the way by the grantor and his subsequent grantees will impair or infringe upon the easement of the first grantee. “Whether the grant of an easement over land entirely excludes the rights of the grantor, or those, other than the grantee of the easement, who have subsequently acquired the fee, from having an easement over the same land, must depend upon the nature of the easement first granted. The easement may, from its nature, be exclusive in the first grantee — as in the case of the easement of right of way granted to a railway company, or the easement of a landing-place granted to the owner of a public ferry. But, in the case of an ordinary way, the grant is not necessarily exclusive.”²

But it cannot be assumed that the grantor intended to reserve any use of the way granted that should limit or disturb the full enjoyment of it by his grantee. “The purpose contemplated by the grant was the creation of an easement for the plaintiff’s use, and not the reservation to the owner of the use of his land. Every use by the owner was abandoned, except such as might be made in a mode entirely consistent with the full and undisturbed enjoyment by the grantee of the easement. The idea of a joint use of the land by both parties, in the sense that a use by the grantee should at any time give way to a use by the grantor, is contrary to the plain meaning and intent of the grant.”³

One who has conveyed a portion of his land bounding it upon “a private way which I lay down,” can use the way for access to his remaining land, and having conveyed the land upon both sides of the way, can use it for access to his land at the end.⁴

380. A right of way laid out by adjoining proprietors, one-half its width on the land of each, may presumably be used by them for all purposes and in any manner either may desire to use it, for each

¹ Reilly v. Booth, 44 Ch. D. 12, 21, 22.

² Campbell v. Kuhlmann, 39 Mo. App. 628, per Thompson, J., citing Kirkham v. Sharp, 1 Whart. 333, 29 Am. Dec. 57; Bird v. Smith, 8 Watts, 434, 34 Am. Dec. 483; Maxwell v. McAtee, 9 B.

Mon. 20, 48 Am. Dec. 409; Lefavour v. McNulty, 158 Mass. 413, 33 N. E. Rep. 610.

³ Herman v. Roberts, 119 N. Y. 37, 43, 23 N. E. Rep. 442, per Ruger, C. J.

⁴ Goss v. Calhane, 113 Mass. 423.

is entitled to use his own half without any limitation. In such case, in the absence of any agreement to the contrary, each owns half the way along its length, and has an appurtenant right of way over the other half.¹

Where a prescriptive road follows the boundary of two estates, so as to afford a presumption of ownership *ad medium filum*, it seems that each owner has the right to use the road for all purposes, though the actual user has been for limited purposes only; for each owner would, of course, be entitled to use his half of the road for any purpose that he liked, and it would seem that he could not be restricted in the uses of the whole road. "It would not come within the general rule that you were putting a greater burden upon the servient tenement, because the one tenement is in that point of view as much a dominant tenement as the other, and they would mutually get the advantage of having the right of way and using it for all purposes."²

381. A right of way acquired by the owners of several properties bounding upon the way cannot be altered in character by any one party without the consent of the others. The owner of the fee of the way may use the servient soil as he pleases, so that he does not interfere with the right of the owner of the right of way; but where the right of way is owned in common with several persons, neither can obstruct the way or alter the character of it in any particular, without the consent of the others.³

VI. *Implied Limitations.*

382. A grant or reservation of a right of way does not authorize the use of it for any purpose beyond that of a way. A right of way carries with it all rights to the use of the soil properly incident to the free exercise and enjoyment of the right granted or reserved, but not a right to use it for a distinct purpose beyond that of a right of way, such as a place of deposit for merchandise, though the way was in the rear of warehouses. "A right of way to a warehouse would, in our judgment, authorize the tenant of the warehouse to place on the ground goods brought to the warehouse, and keep them a reasonable and convenient length of time, to put them in store; and to place and keep goods on the ground a reasonable length of

¹ Holmes v. Bellingham, 7 C. B. N. S. 329, 336; Bradburn v. Morris, 3 Ch. D. 812.

² Bradburn v. Morris, 3 Ch. D. 812, 824, per Mellish, L. J.

³ Ellis v. American Academy of Music, 120 Pa. St. 608, 15 Atl. Rep. 494.

time, which are to be carried from the warehouse. And what would be reasonable and convenient would be a question of fact, dependent on many circumstances. What would be an unreasonable length of time to leave goods on the sidewalk or in the street, when much frequented, would not be unreasonable on rear ground, when they would incommode no one having an equal right of way. But here the case expressly finds that the place was used as a place for the deposit of merchandise, which is another and distinct use from that reserved, and which, whether valuable or not, remains with the owner of the land."¹

One having a right of way over a narrow passage, in which others also have the same right, may be enjoined from obstructing it by allowing carts and wagons to remain stationary in the passage in course of loading and unloading; and it is no justification for such person that the necessity of his business required such use of the passage.²

383. A railroad company having a right of way obtained by condemnation, cannot license the appropriation of any part of such way to private business purposes, as, for instance, for use as a lumber yard. In such case the owner of the fee of the land is entitled to recover the rental value of the premises so occupied for private purposes from the tenant of the railroad company.³

By the right of eminent domain, a railroad may take private property for railroad purposes; but this right does not extend beyond such uses as are reasonably necessary to enable the corporation to discharge its duties to the public. The use of its right of way must be a public use or one incidental to that. The right can be exercised only for purposes intended to benefit the public either directly or indirectly. "The power arises out of that natural principle which teaches that private convenience must yield to public wants. This public interest must lie at the basis of the exercise of the power, or it would be confiscation and usurpation to exercise it. This being the reason for the exercise of such power, it requires no argument to prove that after the right has been exercised, the use of the property must be held in accordance with and for the purposes which justified its taking."⁴

¹ Appleton v. Fullerton, 1 Gray, 186, 192, per Shaw, C. J.; Kaler v. Beaman, 49 Me. 207.

² Thorpe v. Brumfitt, L. R., 8 Ch. App. 650.

³ Lyon v. McDonald, 78 Tex. 71, 14 S. W. Rep. 261. And see O'Neal v. Sherman, 77 Tex. 182, 14 S. W. Rep. 31.

⁴ Lance's Appeal, 55 Pa. St. 16, 25, 93 Am. Dec. 722, per Thompson, J. And

A railroad company may erect buildings in its roadway to facilitate the receipt and delivery of freight; and it may license others to erect buildings for the same purpose.¹

384. An easement for a way only cannot be used for another purpose. Where land is conveyed to a city by a deed, expressly stipulating that no higher rights shall pass to the city than would have been acquired had the city procured the condemnation of the land for "street purposes only," the city cannot appropriate such land for purpose of maintaining water-works.²

An easement of way over an alley confers no right to construct a fire escape, overhanging upon the adjoining buildings.³

An alley dedicated by parol restriction for the common benefit of lots in front of it, and used for many years for the ordinary purposes of an alley, is not restricted to use as a passage-way, and for the drainage of surplus water, but it may be used for laying a drain pipe in connection with a public sewer. This would seem to be a reasonable and proper use of the alley, under such dedication. "The use to which it may be applied would depend upon the growth of the city, the improvement of the adjacent property, and the municipal regulations affecting the public health."⁴

385. In determining the extent of a right of way, it is proper to consider the whole scope and purpose of the deed creating it, the manifest intent of the parties in its execution and the situation of the property.⁵ "When no dimensions, nor purposes, are expressed, the extent and nature of the right of way may be inferred from the

see *Cumberland Val. R. Co. v. McLanahan*, 59 Pa. St. 23; *In Matter of New York Cent. & H. R. R. Co.*, 77 N. Y. 248; *Peirce v. Boston & L. R. Co.*, 141 Mass. 481, 6 N. E. Rep. 96, 24 Am. & E. R. Cas. 634.

¹ *Grand Trunk R. Co. v. Richardson* 91 U. S. 454.

² *O'Neal v. Sherman* (Tex. Civ. App.) 25 S. W. Rep. 57.

³ *Gillespie v. Weinberg*, 6 Misc. 302, 26 N. Y. Supp. 781.

⁴ *McElhone's Appeal*, 118 Pa. St. 600, 609, 12 Atl. Rep. 564, per Clark, J.

⁵ *United Land Co. v. Great Eastern Ry. Co.*, L. R., 10 Ch. 586, 590; *Cowling v. Higginson*, 4 Mees. & W. 245; *Haw-*

kins v. Carbines, 3 H. & N. 914, 27 L. J. Exch. 49; *Hemphill v. Boston*, 8 Cush. 195, 197, 54 Am. Dec. 749; *Underwood v. Carney*, 1 Cush. 285, 292; *Rochester Electric Light Co. v. Rochester Power Co.*, 15 N. Y. Supp. 33, 35; *Bakeman v. Talbot*, 31 N. Y. 360, 88 Am. Dec. 275; *Rexford v. Marquis*, 7 Lans. 249; *Huson v. Young*, 4 Lans. 63; *Herman v. Roberts*, 119 N. Y. 37, 7 L. R. A. 226, 23 N. E. Rep. 442; *McConnell v. Rathbun*, 46 Mich. 303, 9 N. W. Rep. 426; *Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506; *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353; *Robinson v. Missisquoi R. Co.*, 59 Vt. 426, 10 Atl. Rep. 522.

terms of the grant, interpreted in the light of surrounding facts and circumstances. The parties are presumed to have contemplated the necessities, conveniences and usages incidental to a way in such locality, and the grant is to be construed in reference to the position and situation of the place where the way is granted; the intention of the parties being the object of inquiry.”¹

“As I understand,” said Jessel, Master of the Rolls, “the grant of a right of way *per se* and nothing else, may be a right of footway, or it may be a general right of way, that is, a right of way not only for people on foot, but for people on horseback, for carts, carriage and other vehicles. Which it is, is a question of construction of the grant, and that construction will, of course, depend on the circumstances surrounding, so to speak, the execution of the instrument. Now, one of those circumstances, and a very material circumstance, is the nature of the *locus in quo*, over which the right of way is granted. If we find a right of way granted over a metaled road, with a pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage not only of foot passengers, but of horsemen and carts. Again, if we find the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used. Where you find a road constructed so as to be fit for carriages and of the requisite width, leading up to a dwelling-house, and there is a grant of a right of way to that dwelling-house, it would be a grant of a right of way for all reasonable purposes required for the dwelling-house, and would include, therefore, the right to the user of carriages by the occupant of the dwelling-house, if he wanted to take the air, or the right to have a wagon drawn up to the door when the wagon was to bring coals for the use of the dwelling-house. Again, if the road is not to a dwelling-house, but to a factory, or a place used for business purposes, which would require heavy weights to be brought to it, or to a wool warehouse, which would require bags or packages of wool to

¹ Long v. Gill, 80 Ala. 408, 410, per Clopton, J.

be brought to it, then a grant of way would include a right to use it for reasonable purposes, sufficient for the purposes of the business, which would include the right of bringing up carts and wagons at reasonable times for the purposes of the business. That again would afford an indication of the extent of the grant. If, on the other hand, you find that the road in question over which the grant was made was paved only with flagstones, and that it was only four or five feet wide, over which a wagon or cart or carriage ordinarily constructed could not get, and that it was only a way used to a field or close, or something on which no erection was, there, I take it, you would say that the physical circumstances showed that the right of way was a right for foot passengers only. It might include a horse under some circumstances, but could not be intended for carts or carriages. Of course, where you find restrictive words in the grant, that is to say, where it is only for the use of foot passengers, stated in express terms, or for foot passengers and horsemen, and so forth, there is nothing to argue. I take it that is the law. *Prima facie* the grant of a right of way, is the grant of a right of way having regard to the nature of the road over which it is granted, and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot passengers, or restricted to foot passengers and horsemen or cattle, which is generally called a drift way, or a general right of way for carts, horses, carriages and everything else.”¹

386. In determining the extent of a grant of a right of way, it is not proper to refer to the parol negotiations which preceded the grant, or accompanied it. The language of the grant is to be regarded, and when there are ambiguous words, the circumstances surrounding it and the situation of the parties with a view to ascertain the intention.² It is not competent by parol evidence to control the grant of the right in any manner, either to limit or enlarge the use of the way, the extent or the purpose of it.³

One having conveyed to a railroad company a right of way for its road over his property, cannot show by parol evidence that the company agreed to construct its road by a plan which would be the least injurious to the grantor's remaining land. A parol agreement

¹ Cannon v. Villars, 8 Ch. D. 415, 420. See §§ 373-377.

ception Church v. Sheffer, 88 Hun, 335, 34 N. Y. Supp 724.

² Herman v. Roberts, 119 N. Y. 37, 23 N. E. Rep. 442; Immaculate Con-

³ Miller v. Washburn, 117 Mass. 371.

made before or at the time of the execution of the deed cannot affect the rights conferred by it.¹

387. A right of way not bounded or defined except that it is created for a specified use is a way reasonably convenient for that use.²

A conveyance of a right of way over a parcel of land, described by metes and bounds, does not operate to give a right of way over the entire tract described, but merely a right to use a convenient way over such tract sufficient for the purposes intended by the grant.³ Thus, where the owner of a block of stores and some land adjoining them in the rear, conveyed a part of the land, leaving a space of twenty feet between the stores and the land conveyed, "together with the right of passing and repassing over the space," the grantee claimed that he was entitled to an unobstructed use of the whole space. It was held that these terms were descriptive of the land in, through, and over which the grantee was entitled to a right of way, but did not describe the limits of the way granted; and that the grantee was thereby entitled to a convenient way within the land so specified, adapted to the convenient use and enjoyment of the land granted, for any useful and proper purpose for which it might be used.⁴

Where a right of way is reserved across a portion of a farm to a wood lot, the owner of the land subject to this right of way is bound to make its use as convenient to the owner of the easement as is the way which a farmer usually provides for himself to get to and from his woodland.⁵

The owner of a house with a gateway and a paved road under it leading to a paved yard and a vacant piece of ground in the rear, leased the house and vacant ground with the appurtenances, giving the lessee power to erect on the vacant ground a workshop for the purpose of his business as a gas engineer, and it was stipulated that

¹ Gulf, C. & S. F. R. Co. v. Richards 366, 370, 88 Am. Dec. 275; York v. Briggs, 7 N. Y. St. 124; Rexford v. Marquis, 7 Lans. 249; Huson v. Young, 4 Lans. 63; Matthews v. D. & H. Canal Co., 20 Hun, 427; Spencer v. Weaver, 20 Hun, 450.

² Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Dec. 409; Atkins v. Bordman, 2 Met. 457, 37 Am. Dec. 100; Baker v. Frick, 45 Md. 337, 24 Am. Rep. 506; Grafton v. Moir, 130 N. Y. 465, 29 N. E. Rep. 974; Tyler v. Cooper, 124 N. Y. 626, 26 N. E. Rep. 338, aff'g 47 Hun, 94; Bakeman v. Talbot, 31 N. Y. 88 Am. Dec. 275.

³ Long v. Gill, 80 Ala. 408.

⁴ Johnson v. Kinnicutt, 2 Cush. 153.

⁵ Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 275.

the lessee should not obstruct the gateway, except for the purposes of ingress and egress. The workshop was erected, and the only access to it by vehicles was through the gateway and over the yard, which was also the only approach to the stables of the lessor, who carried on business in adjoining premises. The lessor's vans, before the argeement was entered into, had often stood in the yard when not in use. The lessee now alleged that the lessor blocked up the gateway and yard with his vans, and prevented the access of carts and vehicles to his workshop. It was held that the lessee had an implied right of way through the gateway and over the yard for the reasonable purposes of his business; that such right was general and not restricted; and that he was entitled to an injunction to restrain the defendant's obstruction.¹

388. A grantor of an easement cannot do anything to interfere with the privilege granted. Thus, one having platted and conveyed lots in a city with rights of way appurtenant thereto, cannot be allowed afterwards to appropriate the way to any use inconsistent with its use as a public street.²

VII. *Construed by Acts of Parties.*

389. The grant of a way when there is any uncertainty or ambiguity in it may be interpreted by reference to the attendant circumstances, to the situation of the parties, and especially to the practical interpretation put upon the grant by the acts of the parties in the use of the easement immediately following the grant.³ Thus, where one sold land reserving a right of way along the north side of it, and afterwards sold another lot north of the way reserved with a right over it, immediately opposite to the first named lot, but extending only part of the length of the way reserved, evidence was admissible as to the circumstances attending the occupation of the way, in determining whether the grant was of a way over the entire length of the way reserved, or only over the part in front of the land conveyed.⁴

¹ Cannon v. Villars, 8 Ch. D. 415.

² Story v. New York Elev. R. Co., 90 N. Y. 122, 160, 174, 43 Am. Rep. 146; Hills v. Miller, 3 Paige, 254, 24 Am. Dec. 218; Comstock v. Sharp (Mich.) 64 N. W. Rep. 22.

³ Herman v. Roberts, 119 N. Y. 37, 23 N. E. Rep. 442, 7 L. R. A. 226; Tyler v.

Cooper, 124 N. Y. 626, 26 N. E. Rep. 338, 47 Hun 94, 16 N. Y. St. 545; Patton v. Western Carolina Educ. Co., 101 N. C. 408, 8 S. E. Rep. 140.

⁴ Immaculate Conception Church v. Sheffer, 88 Hun, 335, 34 N. Y. Supp. 724.

Moreover, when the grant is ambiguous, the construction given by the parties themselves, as proved by the manner in which they exercised their rights under the deed, is legal evidence.¹ Evidence of the use made of right of way is evidence of the extent of the right, but not of its existence.²

One owning land abutting on a street conveyed the rear portion of it, with a right of way eighteen feet wide, to the street. The deed provided that the grantee "is not to injure or destroy any fruit trees now in a bearing state." For some years before the grant, at the time of the grant, and for many years afterwards there was a foot-path which entered the eighteen-foot strip and then wound among the fruit trees to the street. During all this time it was impracticable to use this strip as a carriage-way, and it could not be used for this purpose without injuring the fruit trees mentioned in the deed, nor without much filling in and grading. The grantee, soon after his purchase, acquired another right of way to another street, and at the same time he built a fence on the boundary between his land and that of the grantor, which enclosed the eighteen-foot strip, and put a gate four feet wide in the fence at the end of the strip. Thirty years after the original grant, a purchaser from the grantee attempted to make the eighteen-foot strip available for a carriage-way. On a bill in equity by the owner of the servient estate it was held that evidence of the facts above stated was admissible to interpret the grant of the way; that declarations of the grantee, that he had a footway through this strip, were admissible, and that the building of a carriage-way should be restrained.³

390. The grant of a way without restriction is understood to be a general way for all purposes. "But, in construing such a grant, reference is to be had to the nature and condition of the subject-matter of the grant at the time of its execution, and the obvious purposes which the parties had in view in making it. Where the words of a deed are ambiguous, and not explainable by the context, the construction given to the words themselves, as shown by the way and manner in which the parties exercised their respective rights, is legal evidence. If a passage-way granted by deed has been used in a certain mode from the time of making the deed to

¹ Choate v. Burnham, 7 Pick. 274,
278, per Parker, C. J.

³ Rowell v. Doggett, 143 Mass. 483,
10 N. E. Rep. 182.

² Rexford v. Marquis, 7 Lans. 249;
Tyler v. Cooper, 47 Hun 94.

the time of an alleged trespass, without any objection being made, this evidence is admissible to show what was intended by the grant.”¹

The rule that the practical interpretation given to a grant or reservation of a way may be deemed evidence of their intention, is not always applicable. “Where the land subjected to a reservation like the one under consideration is crossed by several paths, two or more of which are practically equally convenient, and it is understood when the reservation is made that the land is to be used for quarrying purposes, and depends for its main value upon such use; where the paths are irregular and winding, such as are generally found in rough quarry lands, over which permanent roads are not usually laid out, it being customary to shift them about, and to open and close them as convenience and the profitable operation of the quarry require — the fact that a particular path was used, immediately subsequent to the execution of the deed, so long as such use did not interfere with the convenience of the owner of the servient estate, would not be conclusive of the meaning of the reservation. But in this case we look in vain in the finding for any intimation that there were any acts of the parties contemporaneous with the deed, or immediately following it, to sustain the plaintiff’s claim.”²

¹ Rowell v. Doggett, 143 Mass. 483, ² Colt v. Redfield, 59 Conn. 427, 22
487, 10 N. E. Rep. 182, per Gardner, J.; Atl. Rep. 426.
Choate v. Burnham, 7 Pick. 274.

CHAPTER XI.

OBSTRUCTION OF WAYS.

I. Use in General, 391-394. II. Covering over with Building, 395-399.	III. Erecting Gates and Bars, 400-419.
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I. *Use in General.*

391. The grant of a right of way over land does not pass any other right or incident. The owner of the soil retains full dominion over his land subject merely to the right of way. He may make any use of his land which does not interfere with a reasonable use of the way.¹ Subject to the easement granted, his control extends indefinitely upwards above the surface of the ground, and downwards beneath it *ad inferos*. He may build a bridge or other structure over the way, provided he builds so as not to materially impair the use of the easement.

The water of a spring within the right of way of a turnpike company belongs to the owner of the fee, and not to the turnpike company. Such company has no easement in the spring. "It has a right of way for public travel over the land upon which the waters of this spring descended; and for the purpose of preserving its roadbed in a condition suitable for travel, it may drain the water off. The right is one of drainage of the roadbed only. It is not a right to appropriate, or to take exclusive possession of, the spring itself, or to exclude the owner therefrom." The owner of the fee has the

¹ Clifford v. Hoare, L. R. 9 C. P. 362; N. H. 539; Herman v. Roberts, 119 N. Lyman v. Arnold, 5 Mass. 193, 198; Y. 37, 16 Am. St. Rep. 800, 7 L. R. A. 226; Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 275; Johnson v. Shelter Island Glove Assoc., 122 N. Y. 330, 25 N. E. Rep. 484, aff'g 47 Hun, 374, 14 N. Y. St. 576; Tyler v. Cooper, 47 Hun, 94, 16 N. Y. St. 545; Patterson v. Philadelphia & R. Co., 8 Pa. Co. Ct. 186, 26 W. N. C. 327; Stevenson v. Stewart, 7 Phila. 293.

right to use all the water of the spring, to conduct it by pipe wherever he desires to consume it, and to sell it or to waste it.¹

A right reserved by a grantor to use a portion of the granted land for passing and repassing to and from a neighboring street is a restricted right and does not give the grantor any right to erect a permanent structure thereon.²

392. The grant of a right of way carries only such incidents as are necessary to its reasonable enjoyment. The grantor parts with only what is adequate to the purpose of it. "Notwithstanding such a grant, there remains with the grantor the right of full dominion and use of the land, except so far as a limitation of his right is essential to a fair enjoyment of the right of way which he has granted. It is not necessary that the grantor should expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him, because they are not granted. And, for the same reason the exercise of any of them cannot be complained of by the grantee, who can claim no other limitation upon the rights of the grantor but such as are expressed in the grant, or necessarily implied in the right of reasonable enjoyment."³

The grant of a right of way from the highway to the grantee's mill gives him no right to pile lumber on the sides of the way.⁴

393. The grantor of a right of way can properly do nothing inconsistent with the full and undisturbed enjoyment by the grantee of the easment granted. He may be enjoined from placing obstructions upon the way which materially interfere with the grantee's use of it. "The full extent of the rights of the grantor in the soil of the road was to enter thereon and do such acts only as should not injure or impair the enjoyment by the grantee, and when he went beyond such use, he transcended the rights pertaining to his character as the owner of the soil."⁵

A private right of way over waste land is not necessarily a right

¹ Upper Ten Mile Plank Road Co. v. Braden, 172 Pa. St. 460, 466, 33 Atl. Rep. 562, per Williams, J. And see to like effect Baker v. Frick, 45 Md. 337, 24 Am. Rep. 506.

² Gillespie v. Weinberg, 6 Misc. Rep. 302, 26 N. Y. S. 781.

³ Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Dec. 409, per Marshall, C. J.

⁴ Kaler v. Beaman, 49 Me. 207.

⁵ Herman v. Roberts, 119 N. Y. 37, 23 N. E. Rep. 442, 7 L. R. A. 226, per Ruger, C. J.; Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 275; Joyce v. Conlin, 72 Wis. 607, 40 N. W. Rep. 212.

over every part of the land, and the owner of the soil may enclose the way on each side of it, leaving a convenient way.¹

Where a right of way is created by reservation, the grantee owning the fee has the right to use it as a way, provided he does not interfere with the grantor's use of it.² The grantor in such case has no right to build a fence so as to cut off the grantee's access to any part of the land conveyed to him through the way reserved, and the grantee in tearing down the fence is not a trespasser. The grantee may plow the land so reserved if such use of it does not interfere with the grantor's right of way.

394. The owner of the fee subject to a right of way may use the land for any purpose not inconsistent with the rights of the easement.³ What use the owner of the fee may make of such right of way is a question of fact to be determined by the jury.⁴

II. *Covering over With Buildings.*

395. The owner of land over which there is a passage-way may lawfully cover such passage-way with a building, provided he leaves a space of sufficient width and height and with sufficient light to allow of its convenient use for the purpose for which it was created.⁵ "The owner of the estate in fee," says Chief Justice Shaw, "by virtue of his interest and power as proprietor, may make any and all beneficial uses of it at his own pleasure, and he may alter the mode of using it, by erecting or removing buildings over it, or digging into or under it without restraint. *Cujus est*

¹ Hutton v. Hamboro, 2 Fost. & F. 218.

² Moffitt v. Lytle, 165 Pa. St. 173, 30 Atl. Rep. 922; McTavish v. Carroll, 7 Md. 352, 61 Am. Dec. 353.

³ Atkins v. Bordman, 2 Met. 457, 37 Am. Dec. 100; Burnham v. Nevins, 144 Mass. 88, 10 N. E. Rep. 494; Spalding v. Bemiss (Ky.) 1 S. W. Rep. 468; Harvey v. Crane, 85 Mich. 316, 48 N. W. Rep. 582; Herman v. Roberts, 119 N. Y. 37, 23 N. E. Rep. 442; Grafton v. Moir, 130 N. Y. 465, 471, 29 N. E. Rep. 974; Kansas Cent. R. Co. v. Allen, 22 Kan. 285, 31 Am. Rep. 190; East Tenn. V. & G. R. Co. v. Telford, 89 Tenn. 293, 14 S. W. Rep. 776.

⁴ Harvey v. Crane, 85 Mich. 316, 48 N. W. Rep. 582.

⁵ Atkins v. Bordman, 2 Met. 457, 20 Pick. 291; Burnham v. Nevins, 144 Mass. 88, 10 N. E. Rep. 494; Gerrish v. Shattuck, 132 Mass. 235; Richardson v. Pond, 15 Gray, 387; Beecher v. People, 38 Mich. 289, 31 Am. Rep. 316; Bagley v. People, 43 Mich. 355, 5 N. W. Rep. 415; Sutton v. Groll, 42 N. J. Eq. 213, 5 Atl. Rep. 901; Kana v. Bolton, 36 N. J. Eq. 21; Grafton v. Moir, 130 N. Y. 465, 29 N. E. Rep. 974, 9 N. Y. Supp. 3, 1 N. Y. Supp. 4; Stevenson v. Stewart, 7 Phila. 293.

solum, ejus est usque ad cælum. If any other person has an easement in it, the owner has still all the beneficial use which he can have consistently with the other's enjoyment of that easement. If the easement is a right of way, this consists in a right to use the surface of the soil for the purpose of passing and repassing, and other incidental right of property in the surface for that use; but the owner of the soil has all the rights and benefits of ownership consistent with such easement."¹

396. The rule is the same whether the way be one that is defined by the parties, or undefined, whether in effect it is a convenient way, or it is one defined in width and location either by deed or by the acts of the parties.²

But the owner of the soil of a way has no right to erect a building over it which renders the way low or dark, or otherwise interferes with and obstructs it so as to make its use practically less convenient and beneficial than it was before the building was erected.³ Where a passage-way was reserved by a grantor, four feet wide, from a street to his house, on a lot adjoining the lot conveyed, and the grantee was proceeding to extend a building over the passage-way, the grantor sought to have the grantee enjoined from so doing, on the ground that the building would render the passage-way darker and less agreeable, and would interfere with his enjoyment of light and air at his building. It was found as facts that a passage-way eleven feet in height was a reasonable one as to height, that the way had never been used as a carriage-way, and was not suitable nor intended for such use, and that the means of going to and from the grantor's lot would be practically as convenient and useful after the building was erected over the passage-way, as it had previously been. An injunction was accordingly refused.⁴

A block of land in a city was laid out into lots and the corner lot was conveyed, subject to a right of way fifteen feet in width across the rear thereof, from the side street, "for horses, carriages and carts for the private convenience of the owners" of the other lots, the way to be kept open for such purposes and no other. It was held that the purchaser of the corner lot was not restricted from

¹ *Atkins v. Bordman*, 2 Met. 457, 467, 37 Am. Dec. 100.

³ *Richardson v. Pond*, 15 Gray, 387; *Swift v. Coker*, 83 Ga. 789, 10 S. E. Rep. 442.

² *Gerrish v. Shattuck*, 132 Mass. 235; *Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100, 20 Pick. 291.

⁴ *Gerrish v. Shattuck*, 132 Mass. 235.

building over the way, so long as he left it open the specified width, and of a height sufficient not to interfere with "horses, carriages and carts," through it, and that he was not required to keep it open for the purpose of furnishing light and air to buildings on the other lots.¹

397. A grant or reservation of a passage-way confers no right to have the passage-way left open to furnish light and air for any purpose beyond the convenient use of the passage-way for the purpose for which it was created. A right of way to a stable includes as incident thereto only such light and air as are necessary to convenient use of the passage. It does not carry with it such light and air as the stable needs, but such as the way needs.² Where the owner of the servient estate built over a passage-way four feet wide, but placed no part of the building on the surface of the ground, and left the way unobstructed from a reasonable height above, it was held that the dominant owner had no right to light and air above the way, but only a right of passage with such incidental rights as were necessary for its use.³

A grant of a narrow passage-way, such as one five feet in width, necessarily implies that it is a footway, as it is too narrow to be used for horses and carriages. If such a passage-way is not expressly declared to be for the purpose, among other things, of affording light and air, the owner of the fee of the land may build over the passage-way in such manner as not to render it unfit for its use as a footway. Thus, where a grantor reserved a right of way, of about five feet in width, from a street to his dwelling in the rear of land conveyed, it was adjudged that the owner of the fee might build over the way, provided he did not interfere with the use of the passage as a common footway. Chief Justice Shaw, delivering the opinion, said: "We are satisfied that the right reserved was that of a suitable and convenient footway, to and from the grantor's dwelling-house, of suitable height and dimensions to carry in and out furniture, provisions and necessaries for family use, and to use for that purpose wheelbarrows, handsleds and such small vehicles as are commonly used for that purpose, in passing to and from the

¹ Hollins v. Demorest, 129 N. Y. 676,
29 N. E. Rep. 1093.

³ Gerrish v. Shattuck, 132 Mass. 235.
And see Burnham v. Nevins, 144

² Grafton v. Moir, 130 N. Y. 465, 29 Mass. 88, 10 N. E. Rep. 494, 59 Am.
N. E. Rep. 974, per Vann, J., 9 N. Y. Rep. 61.

Supp. 3, 1 N. Y. Supp. 4.

street to the dwelling in the rear, through a foot passage, in a closely built and thickly settled town.”¹

398. In case it appears from the deed that the intention of the parties was that the passage-way should be in the nature of an open court or street, it cannot be built over. Thus, where a passage was expressly declared to be “for light and air,” it was held that it could not be covered either in whole or in part.² And so a passage-way cannot be built over where it is expressly provided that it shall not be “subject to have any fence or building erected thereon.”³

In like manner, although there be no express provision that the passage-way should be kept open to the sky, if the terms of the grant and the surrounding circumstances show that the purpose was that the passage-way should be kept open substantially as a street or court, not only for the purpose of passing and repassing, but also for purposes such as a street or court is ordinarily used for, as for light, air and prospect, the passage-way cannot be built over.⁴

399. Whether bay-windows may be built over a passage-way depends upon the circumstances of each particular case. Where one was granted a privilege, in common with others, in a five-foot passage-way, in the rear of several dwelling-houses, it was held that an owner in fee of a building abutting upon such passage-way might build bay-windows over the same, at such a height as not to interfere with a passage-way, for the ordinary purposes of passing on foot. The court, in speaking of the intention of the parties in creating the passage-way, said: “The purpose seems to have been to provide a narrow footway leading to the rear of the defendant’s and plaintiff’s lots, and of the lot next westerly of the plaintiff’s, and of the lot on the northerly side of the way, designed for passing and repassing on foot and for carrying in small vehicles articles necessary for family use, and generally to be used as such ways are ordinarily used in a large city.”⁵

But where a passage-way sixteen feet wide was laid out between two important streets, in the rear of blocks of buildings facing upon

¹ *Atkins v. Bordman*, 2 Met. 457, 468, 336. And see *Attorney-General v. Williams*, 140 Mass. 329, 2 N. E. Rep. 37 Am. Dec. 100, 20 Pick. 291. See, to like effect, *Gerrish v. Shattuck*, 132 Mass. 235, 80, 3 N. E. Rep. 214; *Burnham v. Nevins*, 144 Mass. 88, 10 N. E. Rep. 494, 59 Am. Rep. 61, per Morton, C. J.

² *Brooks v. Reynolds*, 106 Mass. 31.

³ *Schwoerer v. Boylston Market Asso.*, 99 Mass. 285.

⁴ *Salisbury v. Andrews*, 128 Mass.

⁵ *Burnham v. Nevins*, 144 Mass. 88, 10 N. E. Rep. 494, 59 Am. Rep. 61.

other important streets, and it was provided that it should be kept open, and was designed as a passage-way for many persons, and was in effect a narrow street, it was held that the owner of a building abutting on the passage-way should be enjoined from building and maintaining bay-windows from a point eight feet above the sidewalk, and extending from three to four feet into the passage-way to the top of the building, six stories high. "Thus we have a passage-way of defined dimensions, in the rear of all the houses on two broad streets, designed for use by all who may have occasion to seek the rear entrances to any of the houses on either street — a passage-way available also for police purposes and for use in the extinguishment of fires — a passage-way which is to be maintained and kept open, and designed for horses and wagons, in a part of a large city, which is designed to be wholly occupied by dwellings of a high class, to which air and light and prospect are not only desirable, but essential in the rear, as well as in the front, with no limitation to the use which may be made of it, or of the persons by whom it may be used. In view of these considerations, we think the language of the stipulation was designed to signify a separation of sixteen feet at least between the rear portions of the buildings abutting on the passage-way. A passage-way sixteen feet wide was not merely to be kept open at the ends, but open to the sky throughout its entire length, for the general convenience and benefit. It is easy to see that the rights of others would be lessened upon any other construction. The opposite owner, who might not wish in like manner to build into the passage-way, would have in the rear of his house a space just so much the narrower. The adjacent owner on the same side, who did not wish to occupy a part of the passage-way with his building, would have light, air and prospect cut off. The right themselves to occupy the passage in this manner would be no equivalent to owners who did not wish to build their houses so as to extend back to the line of it." ¹

III. *Erecting Gates and Bars.*

400. Whether a grantee of a right of way is entitled to a way unobstructed by gates or bars depends upon the terms of a grant, the purposes for which it was made, the nature and situation of the property, and the manner in which it has been used.² "The extent

¹ Attorney-General v. Williams, 140 Mass. 329, 334, 2 N. E. Rep. 80, 3 N. E. Rep. 214, per Allen, J.

² Cowling v. Higginson, 4 M. & W. 245; Smith v. Worn, 93 Cal. 206, 28 Pac. Rep. 944; Houpes v. Alderson, 22

to which the owner of land over which a way is laid may interfere with the use by gates or bars depends upon the purposes for which the way is used, and the necessity of such erection for the protection of the property of the owner of the land. When the way is over agricultural lands, for the benefit of the owner of the same description of land, the fair criterion of the extent to which the owner of land over which the way lies to obstruct it is, whether such owner, having no interest to embarrass his own user of such a way, would, for the protection of his other property, be likely to erect such obstructions.”¹

401. Whether gates across a way may properly be erected and maintained, is a question for the determination of a jury, to be decided according to the circumstances of the case. “The questions whether under all the circumstances of the case as disclosed by the testimony, the gates were necessary to the defendant for the useful and beneficial occupation of his land, looking to the situation of his property; and whether the particular gates complained of were usual and proper under the circumstances; and the further question whether their existence upon the road interfered with the reasonable use of the right of way by the plaintiff, considering the situation of his property and the manner in which it was occupied, and the interest of the parties as to the mode in which the right of way was to be used; these were all questions proper to be decided by the jury, upon the evidence in the case. On all these questions testimony was offered legally sufficient to be submitted to the jury.”²

Iowa, 161; *Amondson v. Severson*, 37 Iowa, 602; *Hemphill v. Boston*, 8 Cush. 195, 54 Am. Dec. 749; *Maxwell v. McAtee*, 9 B. Mon. 20, 48 Am. Dec. 409; *Baker v. Frick*, 45 Md. 337, 340, 24 Am. Rep. 506; *Bean v. Coleman*, 44 N. H. 539; *Garland v. Furber*, 47 N. H. 301, *Bakeman v. Talbot*, 31 N. Y. 366, 368, 88 Am. Dec. 275; *Ellis v. American Acad. of Music*, 120 Pa. St. 608, 15 Atl. Rep. 494.

¹ *Huson v. Young*, 4 Lans. 63, 66, per Mullin, P. J. And see *Mineral Springs Manuf. Co. v. McCarthy*, 67 Conn. 279, 34 Atl. Rep. 1043, *Fenn, J.*, saying: “We think the plaintiff is right in its contention that the lan-

guage of the grant in question, so far as the same is ambiguous and uncertain, should be construed with reference to the circumstances surrounding such grant, and that the nature, condition, and use of the subject-matter thereof at the time the deed was executed should be regarded. But while this is true, it is also certain that neither the court below was required, nor are we permitted to make, under the guise of construction, a new and different contract in lieu of that entered into by the parties themselves.”

² *Baker v. Frick*, 45 Md. 337, 343, 24 Am. Rep. 506, per Bartol, C. J.

Where a way was granted through a "road sixty-six feet wide," to be laid out by the grantor, the terms of the grant do not conclusively show whether the grantee is entitled to a way without gates or bars; but the question is one of fact to be determined from the evidence, including the terms of the grant, the circumstances under which it was made, and the nature and situation of the property.¹

402. If the grant of the right of way is unrestricted in terms, there is no implication that the way is to be kept open and free from gates, unless the nature of the use to which it is to be applied indicates that it should be open and unobstructed.²

Parol evidence is not admissible to limit a right of way when no limitation is indicated by the grant, either in the extent of the way or in the uses which may be made of it. Thus, such evidence is inadmissible to show that the grant was intended to be only a right to reach a portion of the land conveyed. Parol evidence to show that at the time of the execution of the deed the limits and uses of the way were known to the parties, and that the intention was to grant a right in the way as it then was, including a right on the grantor's part, of maintaining a fence with an opening for an entrance upon the granted premises, upon the line between such premises and the way, is inadmissible to control the terms of the deed.³

403. Of course, if there is any stipulation or declaration in the grant that the way shall not be obstructed in any manner, the intention of the parties so indicated must be observed. Thus, a deed provided that the grantee should have the privilege of a passage-way fourteen feet wide over the grantor's land, "said passage-way to be used in common with others to go to and from the premises from the highway with teams or otherwise; not to be incumbered in any way or by any person whatever, except the doorsteps may come one and a half feet into the said passage-way." At the time of the conveyance the doorsteps of the house conveyed extended into the passage-way about the distance mentioned. At that time, moreover, there were bars across the passage-way, and the grantor's land beyond the bars was used as a pasture. It was held that the bars were an incumbrance, and that the grantee was entitled to have

¹ Smith v. Worn, 93 Cal. 206, 28 Pac. Rep. 944.

² 22 Iowa, 161; Huson v. Young, 4 Lans. 63; Maxwell v. McAtee, 9 B. Mon. 20,

³ Whaley v. Jarrett, 69 Wis. 613, 34 N. W. Rep. 727; Houpes v. Alderson,

48 Am. Dec. 409.
³ Miller v. Washburn, 117 Mass. 371.

them removed. The fact that upon the existence of the bars depended the use of the grantor's land beyond them for a pasture was regarded by the court as of little or no significance, since the grantor in his conveyance did not see fit to make any reference whatever to such fact, or make any qualification, limitation, restriction or provision relating thereto, or by reason thereof. On the contrary, it would seem that the language used was purposely made as broad and comprehensive as possible. "We think, however, that in view of the unqualified language employed throughout the grant of this right of way, making, as we have seen, no discrimination between different portions of it; locating a passage-way to be used in common, then providing that it was "not to be incumbered in any way or by any person whatever;" then making, as the sole expressed exception, the grant of a privilege to the grantees to so incumber by doorsteps — we are not at liberty to override the rule that would make this exception of one, even if less peculiar and suggestive than it is, operate as an exclusion of all others, and to hold either that the bars and gateway were not an incumbrance, though the facts, which would show what inconvenience their continuance might cause, do not appear, or to hold that, being an incumbrance, they were not intended to be covered by the expression used." ¹

Where a convenient crossing over a railroad at grade was reserved by one who conveyed to the company a right of way, the location to be determined by the grantor, and the crossing to be maintained by the railroad company, a crossing was built by the company at a place designated by the grantor, and was maintained by the company for about thirty years without any obstruction by gates or bars. It was held that the grantor and his assigns were entitled to a way kept open without gates or bars. "While, in terms, it was not provided that this crossing should be unobstructed by gates or bars, yet the facts, that it was to be 'convenient,' and that the railroad company itself constructed and for many years permitted the existence of such a one, sufficiently show that what it intended to grant was a free right of passage. No usage or circumstances, such as are shown where one grants a way or right of way over a field devoted to agricultural or other purposes, indicating that the right granted is to be subordinate to the rights of the grantor, or the use made by

¹ Mineral Springs Manuf. Co. v. McCarthy, 67 Conn. 279, 34 Atl. Rep. 1043, per Fenn, J.

him of the premises, here exist. That a crossing obstructed by gates or bars is far less convenient to those entitled to use it, is fully conceded by the defendant's argument."¹

404. If a right of way is granted "as now laid out," this being three feet wide and without a gate at the time of the conveyance, the owner of the servient estate has no right to erect a gate at the entrance of the way or to narrow the way by gate posts. "If the obstruction in the way had existed at the time of the deed to defendant, or even if it had been shown that similar passage-ways were usually so closed, the plaintiff's claim would stand on stronger ground, for it may well be presumed that the parties to the grant were acquainted with the public usages, and created this easement with reference to those usages. * * * When the way is defined, as in the case at bar, the construction we give is, in the words of Chief Justice Shaw, 'necessary to the security of both parties; to the grantee, to insure him a way of known width and dimension, the sufficiency of which he may judge of before he closes his contract for the purchase; and to the grantor, to secure himself against the claim of the grantee to an indefinite right to pass over his premises.'"²

The owner of a parcel of land, having a lane twenty-five feet wide running through it, from a highway to a river, and with a stone wall on either side of the lane, and a gate at the entrance of the lane into the road, conveyed the land on the northerly side of the lane, with a privilege to the grantee, "to use the lane on the south side of said premises to drive his cattle to pasture and his teams, for the convenient occupation of said premises." This grantee subsequently acquired that part of the land on the southerly side of the lane, nearest the highway, together with the fee in that of the lane adjacent to it. Another purchaser acquired the rest of the land on the southerly side of the lane, with the fee in the lane adjacent to it. It was held that the latter purchaser had no right to erect a gate across the lane on the line between his land and that of the other purchaser. "The grant of the use of the lane was the grant of a right of way in the lane, as thus located and defined. To construe it as anything less would be to do injustice to the grantee, who, having found a way such as that described in the deed, was able to determine, from its width and

¹ Williams v. Clark, 140 Mass. 238, 164, 100 Am. Dec. 113, per Colt, J., 239, 5 N. E. Rep. 802, per Devens, J. quoting from Salisbury v. Andrews.

² Welch v. Wilcox, 101 Mass. 162, 19 Pick. 250, 258.

direction, when he closed the purchase, whether it was sufficient for his purposes. It was granted 'for the convenient occupation' of the premises conveyed, and the grantee was entitled to all the convenience which, as it then existed, it could afford in the management of the farm on which it bounded."¹

405. A grant of the free right of passage-way "with free ingress and egress at all times" does not imply that a gate across it is an obstruction, especially if the gate was there at the date of the deed. "The fact that the gate was there at the date of the grant, and that it was allowed to remain, cannot change the plain meaning of the words of the grant, but it may help us to ascertain the intention of the parties, if there be any doubt as to their meaning. * * * But what is meant by the free use of the passage-way? Does it necessarily mean that there shall be no gate or door hung across it, or, if there is, that it shall always be kept open? Has not the owner of a passage-way its free use if he hangs a gate across it at its intersection with the street? If I grant the free use, right and privilege of the hall of my house, with free ingress and egress at all times, must I take off the door leading into it, or keep it wide open in order that the grantee may have the free use of it? Or can he not have its free use if he can enter it by opening the door whenever he chooses? Without doubt, I cannot unreasonably obstruct his use of it, but if the door amounts practically to little or no inconvenience, it seems to me that it is not necessarily a wrongful obstruction. *Free* is a relative term when applied to the use of a thing. It does not follow that I have not then free use of a room because I have to open a door in order to get into it; nor does it follow that I have not the free use of an alley because I have to open a gate to go in and out of it. A gate may be so placed as to be a practical and unreasonable obstruction to the free use of a passage-way; and it may be so constructed and placed as not to amount to any practical obstruction to its use. Whether the gate in this case amounted to a wrongful obstruction was, therefore, a question of fact for the jury. If it was not a practical hindrance, and, under the circumstances, an unreasonable obstruction to the plaintiff's use of the passage-way, then it was not a wrongful or illegal obstruction for which an action will lie."²

¹ Dickinson v. Whiting, 141 Mass. 414, 416, 6 N. E. Rep. 92, per Devens, J.

² Connery v. Brooke, 73 Pa. St. 80, 84, per Williams, J., reversing Brooke v. Connery, 7 Phila. 193.

406. It is reasonable that the owner of the fee in land subject to a right of way should maintain a gate at the point where it intersects a public road. While such a gate may be a slight inconvenience to the owner of the easement, it may be quite essential for the use and enjoyment of the land.¹ "It may be true that the owner of the servient estate cannot maintain an unreasonable number of gates, or otherwise unnecessarily interfere with the use of the way by the owner of the dominant estate; but we think it entirely clear that maintaining a gate at the place where the private way intersects a public road is a reasonable and legitimate exercise of the right which resides in the owner of the fee. We have found no substantial diversity of opinion upon this question, for the authorities are well agreed that it is the right of the owner of the servient estate to swing a gate across the private way."²

407. The rule is general that the landowner may put gates and bars across a way over his land, which another is entitled to enjoy, unless, of course, there is something in the instrument creating the way, or in the circumstances under which it has been acquired or used, which shows that the way is to be an open one.³ The easement of way is for passage only. The land remains the property of the owner of the servient estate and he is entitled to use it for any purpose that does not interfere with the easement. "To do this it might be necessary under some circumstances to inclose the way

¹ Phillips v. Dressler, 122 Ind. 414, 24 N. E. Rep. 226; Whaley v. Jarrett, 69 Wis. 613, 34 N. W. Rep. 727; Short v. Devine, 146 Mass. 119, 15 N. E. Rep. 148.

² Phillips v. Dressler, 122 Ind. 414, 24 N. E. Rep. 226.

³ Illinois: Green v. Goff, 153 Ill. 534, 39 N. E. Rep. 975, aff'd 44 Ill. App. 598.

Indiana: Frazier v. Myers, 132 Ind. 71, 31 N. E. Rep. 536; Phillips v. Dressler, 122 Ind. 414, 24 N. E. Rep. 226; Fankboner v. Corder, 127 Ind. 164, 26 N. E. Rep. 766.

Iowa: Houpes v. Alderson, 22 Iowa, 161; Amondson v. Severson, 37 Iowa, 602.

Kentucky: Gibson v. Porter (Ky.) 15 S. W. Rep. 871; Maxwell v. McAttee, 9 B. Mon. 20, 48 Am. Dec. 409.

Maryland: Baker v. Frick, 45 Md. 337, 24 Am. Rep. 506.

Massachusetts: Short v. Devine, 146 Mass. 119, 15 N. E. Rep. 148.

New Hampshire: Garland v. Furber, 47 N. H. 301; Bean v. Coleman, 44 N. H. 539.

New York: Brill v. Brill, 108 N. Y. 511, 15 N. E. Rep. 538; Huson v. Young, 4 Lans. 63; Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 275.

Pennsylvania: Connery v. Brooke, 73 Pa. St. 80.

Wisconsin: Whaley v. Jarrett, 69 Wis. 613, 34 N. W. Rep. 727; Johnson v. Borson, 77 Wis. 593, 46 N. W. Rep. 815, 20 Am. St. Rep. 146; Wille v. Bartz, 88 Wis. 424, 60 N. W. Rep. 789.

with the field over which it passes, and if this is done with a reasonable regard to the convenience of the owner of the easement, it affords him no just ground of complaint.”¹

408. One having a right of way over an alley, cannot complain of the owner of the fee for changing the position of the gate, erecting a wooden platform, and wainscoting the walls leading from the old entrance to the new gate, and thus narrowing the width of the alley an inch and a half, unless such acts interfere with the reasonable and convenient use and enjoyment of the alley-way, and this is a question for the jury.²

Where by contract it is provided by the parties that a gate of a particular kind shall be maintained at each end of a private road, neither party will be permitted to maintain one of a different kind without the consent of the other.³

409. No obligation rests upon the landowner to fence the way in which another has an easement. “In the absence of fences, his horses and cattle must not obstruct the way, and the owner of the way is bound by the exercise of due and reasonable care by his own methods to prevent his cattle or other animals from trespassing. An inclosed road might be a convenience, but its creation is not imposed upon the owner of the soil by the terms of the reservation; it is not an actual or direct necessity to the full enjoyment of the privileges reserved, and it cannot be implied as incident thereto.”⁴

410. The owner of the right of way is not entitled to fence in the way against the wishes of the owner of the soil. A reservation of a “reasonable right of way across the land” conveyed does not entitle the grantor to inclose the way with fences to the detriment of the owner of the soil. “The word ‘reasonable’ obviously has reference to the width and limits of the way to be enjoyed, but still it is a mere right of way, a mere easement, and no more, and, though a burden, is not an estate or interest in lands, and does not confer on the owner of the easement any exclusive or permanent right of occupancy, but merely a transitory use. The owner of the servient estate is circumstanced in respect to this easement substantially as the owner of an estate along or over which a highway

¹ Hartman v. Fick, 167 Pa. St. 18, 31 Atl. Rep. 342.

² Frank v. Benesch, 74 Md. 58, 21 Atl. Rep. 550.

³ Sachs v. Cordes, 11 Ohio C. C. 145.

⁴ Brill v. Brill, 108 N. Y. 511, 517, 15 N. E. Rep. 538, per Danforth, J. Approved in Sizer v. Quinlan, 82 Wis. 390, 52 N. W. Rep. 590.

passes is at common law in respect to fencing the highway. He may fence along the highway or not, as his convenience may dictate, but he is not bound to fence it, or to permit any one else to do so. If the owner of the easement is allowed to fence in his right of way, it will work, it is manifest, an exclusion of the owner of the soil from the land over which it passes, the full legal title to which still remains in him, which was not contemplated by the language used in the deed reserving the right of way * * * and would permit the owner of the easement to exercise rights and avail himself of methods of a use and enjoyment of the estate of the servient owner of a more permanent character than a mere right of way over his lands, and not essentially pertaining to or resulting from a mere easement over them.”¹

411. Where a deed of a right of way provided that the same should not be fenced, but for forty years gates across the way at either end had been maintained, the construction thus given to the provision of the deed precludes any party from insisting that the way shall be kept entirely open without gates. The court in such a case will adopt the construction given to the provision by the parties and will hold them to it.²

If at the time of the conveyance by which a right of way was created, a gate across the way was in use and the grantee suffers it to remain a considerable time, he is regarded as having taken the right subject to such encumbrance.³

412. The owner of the easement may be required to keep the gates closed for the protection of the owner of the land. The owner of a farm sold a portion of it, reserving a free ingress and egress over an existing way across which gates were placed at the division line, between the parcel sold and that retained. The grantee complained that the grantor left the gate open, and the grantor complained because the grantee refused to maintain fences along the road by his land. In an action to restrain the grantor from using the road unless he should close the gate, it was held that the reservation simply entitled the grantor to a reasonably convenient passage upon the road; that as it appeared that the gate in the line fence was in the grantor's portion, it was his duty to maintain it and close the gate after passing through; and that the grantee was not

¹ Sizer v. Quinlan, 82 Wis. 390, 52 N. W. Rep. 590.

² Frazier v. Myers, 132 Ind. 71, 31 N. E. Rep. 536.

³ Connery v. Brooke, 73 Pa. St. 80.

required to build fences along each side of the road, and that an enclosed way was not an actual or direct necessity to the full enjoyment of the way reserved.¹

But if the landowner has put up for bars heavy poles fourteen feet long, and three to five inches thick, the owner of the easement may refuse to put up the bars after passing, on the ground that they are too heavy to handle.²

One having a right of way over lands of another, subject to gates across it, may remove the gates, and his right to use the way is not forfeited unless a court of equity so decrees.³

413. Where a right of way is created by reservation, the grantee acquires the property subject only to this right, and may use the land for all purposes not inconsistent with it. "The only limitations upon the right of the grantee are such as are necessary to the proper use of the right of way; nothing which is not expressly reserved will be regarded as an incident to the reservation except that which is necessary for such reasonable enjoyment and use."⁴ Accordingly it was held that the erection of gates or bars at the termini of the way was not an unreasonable interference with its use. "The right of way intersected a public highway, and it is not to be presumed under such reservation that it was intended that the grantee should open the premises to the public and surrender important and valuable rights of use and control of the land conveyed to him by the deed, so that it would be entirely valueless to him."

414. A reservation of a right of way "over a strip of land ten feet wide," describes the land and not the limits of the way. A grantee may use the strip for any purpose not inconsistent with the enjoyment of the way. Thus, where the owner of a city lot conveyed the front part, on the northerly side of which stood a house

¹ Brill v. Brill, 108 N. Y. 511, 15 N. E. Rep. 538; Amondson v. Severson, 37 Iowa, 602; Phillips v. Dressler, 122 Ind. 414, 24 N. E. Rep. 226.

² Keating v. Hayden, 30 Ill. App. 433.

³ McMillan v. Cronin, 75 N. Y. 474, 476, 57 How. Pr. 53. "An action would lie for the trespass committed by the removal, if illegally made, or perhaps, in equity, to enforce a forfeit-

ure of the right, but there is no rule which authorizes the party over whose land the way passes, under the existing state of facts, to take the law in his own hands and violently prevent the use of the way, and thus assert and maintain his alleged rights." Per Miller, J.

⁴ Green v. Goff, 44 Ill. App. 589, 591, per Cartwright, J. Affirmed, 153 Ill. 534, 39 N. E. Rep. 975.

covering nearly two-thirds of its width, reserving for the benefit of the rear part a right of way "over a strip of land ten feet wide on the southerly line of the granted premises," the grantee erected a partition fence on the "south line of the way" and put up gates at either end of the "strip," and an action was brought for obstructing the way. It was held that the partition fence on what must be taken to be the division line was not an obstruction, and that, in the absence of controlling evidence, the gates were rightfully maintained. As to the partition fence, the court said that any conveyance of land includes the right and the duty to have a fence upon the division line, and that such a fence is not a disturbance of a right of way granted or reserved. As to the right to erect the gates, the court said that it is not to be presumed that the grantee agreed to leave the yard open to the public, and that the gates were not an interference with the way reserved.¹

415. A right of way acquired by prescription is measured by the use during such period, and the owner of the land has no right to do anything to hinder or obstruct such use. Thus, where the owner of land erected a gate in a lane in which another had acquired a right of way by use for more than twenty years, he was enjoined from maintaining the obstruction.²

The common and ordinary use made of a right of way during the time the right was acquired by adverse use and enjoyment establishes the extent of the right, though it qualifies it as well. If the way is a narrow passage-way, which has been used not only for passing over, but for hoisting goods in bails and boxes, the owner of the soil cannot obstruct the way by erecting in it an iron post which narrows the way or by erecting a building over it in such a manner as to interfere with the use which the owner of the easement has always made of it.³

If a way acquired by use was restricted, during the time required to establish the right, to a use of it with bars or gates across it, the right acquired is restricted to the same extent; and, on the other hand, if the way was well defined and fenced and was used as an open and unobstructed way during the time necessary to give a right by prescription, the party acquiring the right may continue to use

¹ Short v. Devine, 146 Mass. 119, 15 N. 578; Fankboner v. Corder, 127 Ind. E. Rep. 148; Johnson v. Kinnicut, 2 164, 26 N. E. Rep. 766.
Cush. 153.

³ Richardson v. Pond, 15 Gray, 387.

² Shivers v. Shivers, 32 N. J. Eq.

the way unobstructed by gates or bars; and the owner of the servient estate has no right to change the way to another and different locality and obstruct the new way with gates or bars.¹

416. But if the way was created by grant or reservation, and its location only was defined by use acquiesced in by the owner of the fee, such use does not establish the right to an open way, but such owner may put up gates across the way. Thus, where a right of way was reserved over land that was unfenced in a country that was sparsely settled and open, and afterwards the owner fenced his land and put up gates across the way that had been located by usage, it was held that the gates were not an unreasonable interference with the right of way, and that the use of the way which served to define its location, did not establish the right to an open road unobstructed by gates.²

417. But a way for agricultural purposes, created by adverse use, may be closed by a gate for the benefit of the servient estate, if established in a reasonable manner.³ “It is true that a way gained by adverse use gives rights commensurate with the adverse use, but if the use be for agricultural purposes only, then the way becomes a way for that use, a use to be exercised in a reasonable manner; and reasonable use of a way for agricultural purposes, whether created by grant or adverse user, may properly be subjected to gates and bars not unreasonably established. The way may be gained without being so obstructed at all, but it is nevertheless a way for a particular use, and in the enjoyment of that use, unreasonable obstructions only are prohibited. The nature of the easement gained determines its character, and not the particular manner of the use that created the right.”⁴

418. When the right of way is to be used only at uncertain intervals, the owner of the land is entitled to notice of the intention of the owner of the easement to make use of the way. Thus, if a person has a privilege of taking stones and gravel from the land

¹ Rogerson v. Shepherd, 33 W. Va. Shaw, 82 Me. 379, 19 Atl. Rep. 856; 307, 10 S. E. Rep. 632.

² Green v. Goff, 153 Ill. 534, 39 N. E. Atl. Rep. 144; Bean v. Coleman, 44 N. Rep. 975; Maxwell v. McAtee, 9 B. H. 539, 543, 547; Garland v. Furber, 47 Mon. 20, 48 Am. Dec. 409. N. H. 301, 304.

³ Knobloch v. Hollinger, 9 Ohio C. ⁴ Ames v. Shaw, 82 Me. 379, 19 Atl. Ct. 286, 3 Ohio Dec. 74; Ames v. Rep. 856, per Haskell, J

of another, where it is most convenient and least prejudicial, to build and repair a dam and canal, with a privilege of passing and repassing from a road through the land with teams, by gates or bars for that purpose, where most convenient and least prejudicial, the owner of the land subject to the easement is entitled to reasonable notice of the intention of the owner of the easement to make repairs, before being liable to an action for obstructing the right of way. The landowner is not bound at all times to keep the way free from obstructions, for this would unreasonably deprive him of the use of the land.¹

419. The doors and gates of buildings and fences, in a populous town, may be made to swing over a public or private way, without making the owner liable as a trespasser. He has a right to the enjoyment of his estate consistent with the servitude of the way. "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation, and much on public usage. The general use and the acquiescence of the public is evidence of the right. The owner of land may make such reasonable use of a way adjoining his land as is usually made by others similarly situated. As to the reasonableness of the use, it may well be laid down that in a populous town, where land is very valuable, it is not unreasonable to erect buildings and fences on the line of the street and to place doors and gates in them, so as when opened to swing over the street."²

¹ *Mansfield v. Shepard*, 134 Mass. 520.

² *O'Linda v. Lothrop*, 21 Pick. 292, 297, per Morton, J. This case was cited with approval in *Underwood v. Carney*, 1 Cush. 285, 292, where the

court say: "The defendants have a right to make a reasonable use of the way adjoining to their land; and public usage—the use, which others, similarly situated, make of their land,—is evidence of a reasonable use."

CHAPTER XII.

PUBLIC RIGHTS OF WAY.

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| <p>I. Dedication at common law, 420-445.</p> <p>II. Statutory dedication, 446-448.</p> <p>III. Acceptance of dedication, 449-456.</p> <p>IV. Public rights of way by prescription, 457-477.</p> <p>V. Extent of the public easement, 478-493.</p> | <p>VI. Telegraph and telephone lines in highways, 494-498.</p> <p>VII. Street railroads in highways, 499-505.</p> <p>VIII. Elevated and steam railroads in highways, 506-528.</p> <p>IX. Abandonment and obstruction of public ways, 529-552.</p> |
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I. *Dedication at Common Law.*¹

420. The term highway is applied to all kinds of public ways, whether carriage-ways, cart-ways, bridle-ways, or footways. The presumption is that a highway may be used by the public for any and all kinds of passage for which the public may desire to use it.² But the public right is limited to a right of passage; for while a highway may be used for the ordinary driving of cattle, one putting cattle upon it to feed is a trespasser against the owner of the soil.³ In other words, cattle are lawfully on a highway only for passing; or, in other words, only for using it as a way.⁴

A way may be a public highway, though it is closed at one end and is a *cul de sac*.⁵

¹ In this chapter only such parts of the law relating to highways, as pertain to the subject of Easements, are considered. These are the parts that relate to the creation of such easements by dedication and prescription, to the extent and limitations of such easements, and to their abandonment and obstruction. For other parts of the law relating to highways, see the admirable works of Dillon on Municipal Corporations, and Elliott on Roads.

² Leake's Lands Laws, Pt. III., p. 483.

³ Stevens v. Whistler, 11 East, 51.

⁴ Dovaston v. Payne, 2 H. Bl. 527.

⁵ Bateman v. Bluck, 18 Q. B. 870; Souch v. East London R. Co., L. R. 16

Eq. 108; Jarvis v. Dean, 3 Bing. 447, 448, per Best, C. J.; Woodyer v. Hadden, 5 Taunt. 125; King v. Marquis of Downshire, 4 Ad. & El. 698; Bartlett v. Bangor, 67 Me. 460, 25 L. R. A. 262, 25 Atl. Rep. 692; Greene v. O'Connor, 18 R. I. 56; Simmons v. Mumford, 2 R. I. 172, 183; Union Co. v. Peckham, 16 R. I. 64, 12 Atl. Rep. 130; Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. Rep. 961; Stone v. Brooks, 35 Cal. 489; Fields v. Colby, 102 Mich. 449, 60 N. W. Rep. 1048; People v. Kingman, 24 N. Y. 559; Mahler v. Brumder, 92 Wis. 477, 66 N. W. Rep. 502, 31 L. R. A. 695; Moore v. Roberts, 64 Wis. 538, 25 N. W. Rep. 564.

421. A turnpike road is a public highway.¹ Every one has the right to use it upon paying the toll established by law, in the same manner that he may use any other highway. The distinctive feature of such a road is the right the company or proprietors authorized to construct it, to collect tolls from persons using it, and to enforce the collections by having gates or bars on it, to obstruct the passage till the tolls are paid.² It differs from an ordinary highway only in the mode of constructing and maintaining it. It is a public easement, and not private property. It is constructed and supported by the tolls exacted, while an ordinary highway is constructed and maintained by public money raised by taxation.³

422. Public rights of way are rights in gross. They are regarded by some as being not strictly easements, though they are quite generally spoken of as such by judges and legal authors in this country. In England, Lord Cairns has said: "An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement, it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves the obligation of repairing it."⁴

It is true, nevertheless, that the public right of way has generally been spoken of as an easement,⁵ and it is here treated as an easement of exceptional character. A dedication of a way for public use is in effect a grant, which is good although there is no grantee in existence to whom the grant can be made, for the indefinite and unorganized public cannot take title as grantees. In such cases a trustee may be appointed to take and protect the title.⁶ "The rule that a right in the public to use the land of an individual may be vested by dedication, by acts *in pais*, when such a right can vest in

¹ Northam Bridge Co. v. London Ry, 6 Mees. & W. 428; Virginia Canon Toll-road Co. v. People, 22 Colo. 429, 4 Am. & Eng. Corp. Cas. (N. S.) 203.

² Haight v. State, 32 N. J. L. 449.

³ Commonwealth v. Wilkinson, 16 Pick. 175, 26 Am. Dec. 654; Craig v. People, 47 Ill. 487; State v. Hannibal & R. C. Gravel-Road Co. (Mo.), 39 S. W. Rep. 910.

⁴ Rangeley v. Midland Ry. Co., L. R. 3 Ch. 306, 311.

⁵ Dovaston v. Payne, 2 H. Bl. 527, per Heath, J.

⁶ Cincinnati v. White, 6 Pet. 431; New Orleans v. United States, 10 Pet. 662; Maywood County v. Maywood, 118 Ill. 61, 6 N. E. Rep. 886; Warren v. Jacksonville, 15 Ill. 236; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255; Bryant v. McCandless, 7 Ohio, 476; Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. Rep. 1008; Meeker v. Puyallup, 5 Wash. 759, 32 Pac. Rep. 727.

an individual only by grant, is anomalous, and grows out of the necessity of the case, and has been accounted for on the ground that there is no grantee *in esse* capable of taking. The origin of the doctrine of dedication has sometimes been ascribed to *Lade v. Shepherd*,¹ decided about one hundred and fifty years ago. That is the earliest case in which we find the word 'dedication' used, and in which some of the requisites of a dedication are suggested. But, though it has been greatly developed and modified since that time, to meet the altered conditions of public needs, the doctrine had its roots in the common law for centuries before that case. The public right, however, was not described as held by dedication, but by custom."²

But the easement of a public way or park is not in the municipality, but in the public at large.³

423. A dedication of land to public use is either according to the common law, or in pursuance of a statute. The former operates by way of estoppel *in pais*, and the latter by way of grant.⁴ "A common-law dedication is the setting apart of land for the public use, and to constitute a valid and complete dedication two things are necessary, to wit, an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication."⁵

A common-law dedication is either express or implied. When it is created by a writing, the easement may be limited by such terms and conditions as the person making the dedication may choose to impose, and the public is bound by them upon acceptance.⁶ An express dedication need not be made by an express grant. A reservation in a conveyance declared by the grantor to be for the purpose

¹ 2 Strange, 1004.

² *Watson v. Chicago, M. & St. P. R. Co.*, 46 Minn. 321, 48 N. W. Rep. 1129, 1130, per Gilfillan, C. J.

³ *Attorney-General v. Abbott*, 154 Mass. 323, 28 N. E. Rep. 346, 13 L. R. A. 251; *Abbott v. Cottage City*, 143 Mass. 521, 10 N. E. Rep. 325.

⁴ *Cincinnati v. White*, 6 Pet. 431; *Pawlet v. Clark*, 9 Cranch. 202; *Smith v. San Luis Obispo*, 95 Cal. 463, 30 Pac. Rep. 591; *Denver v. Clements*, 3 Colo. 472; *Forney v. Calhoun County*, 84 Ala. 215, 4 So. Rep. 153; *Noyes v. Ward*,

19 Conn. 250; *Leonard v. Baton Rouge*, 39 La. Ann. 275, 4 S. W. Rep. 241; *Brown v. Manning*, 6 Ohio, 298, 27 Am. Dec. 255; *Benn v. Hatcher*, 81 Va. 25; *Ford v. Whitlock*, 27 Vt. 265.

⁵ *People v. Dreher*, 101 Cal. 271, 273, 35 Pac. Rep. 867, per Searles, C.; *Smith v. San Luis Obispo*, 95 Cal. 463, 30 Pac. Rep. 591.

⁶ *Long v. Battle Creek*, 39 Mich. 323, 33 Am. Rep. 384; *Elliott on Roads*, 91; *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. Rep. 692, 19 L. R. A. 262.

of a public street is an express dedication of the land reserved. Even a verbal declaration by the owner of land that he sets apart certain land for the use of the public is an express dedication of it binding upon him upon its acceptance by the public.¹

424. An implied dedication is founded upon the doctrine of estoppel.² It may be "established in every conceivable way by which the intention of the party could be manifested." An intent to dedicate must be manifested in some way by the visible conduct and open acts of the landowner.³

A common-law dedication vests an easement only in the public, the fee of the land remaining in the landowner subject to the easement.⁴ Even a deed of "a parcel of land for the purposes of a road" conveys only an easement.⁵ A deed of land "for a road," or "for road purposes," or "for the use of a plank-road," is a conveyance of an easement only.⁶ A dedication of a highway to the public may be general, or for all purposes, or it may be limited to a particular use. The limited use may be for a footway, or for a carriage-way only. In such case the public right cannot exceed the right given, unless it is enlarged by adverse use.⁷

425. Whether one has dedicated a way to the use of the public as a highway is a question of intention.⁸ There can be no such dedication contrary to the intention of the landowner. The intention

¹ *Forney v. Calhoun County*, 84 Ala. 215, 4 So. Rep. 153; *Carter v. Portland*, 4 Oreg. 339.

² *Cincinnati v. White*, 6 Pet. 431; *Morgan v. Railroad Co.*, 96 U. S. 716; *Hewitt v. Pulaski* (Tenn.), 36 S. W. Rep. 878; *Waugh v. Leech*, 28 Ill. 488; *People v. Marin County*, 103 Cal. 223, 37 Pac. Rep. 203; *Daniels v. Almy*, 18 R. I. 244; *Baker v. Vanderburg*, 99 Mo. 378, 12 S. W. Rep. 462.

³ *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. Rep. 839.

⁴ *Campbell v. Kansas City*, 102 Mo. 326, 13 S. W. Rep. 897; *Freedom v. Norris*, 128 Ind. 377, 27 N. E. Rep. 869; *Attorney-General v. Abbott*, 154 Mass. 323, 28 N. E. Rep. 346, 13 L. R. A. 251.

⁵ *Wason v. Pilz* (Oreg.), 48 Pac. Rep. 701.

⁶ *Robinson v. Railroad Co.*, 59 Vt.

426, 10 Atl. 522; *Sanborn v. Minneapolis* (Minn.), 29 N. W. 126.

⁷ *Stafford v. Coyney*, 7 B. & C. 257; *Poole v. Huskinson*, 11 M. & W. 827; *Arnold v. Blaker*, L. R. 6 Q. B. 433; *Danforth v. Durell*, 8 Allen, 242; *Hemp-hill v. Boston*, 8 Cush. 195.

⁸ *Irwin v. Dixon*, 9 How. 10; *McKey v. Hyde Park*, 134 U. S. 84, 10 Sup. Ct. Rep. 512; *Morgan v. Railroad Co.*, 96 U. S. 716.

Arkansas: *Jones v. Phillips*, 59 Ark. 35, 26 S. W. Rep. 386; *Ayers v. State*, 59 Ark. 26, 26 S. W. Rep. 19.

Arizona: *Evans v. Blankenship* (Ariz.), 39 Pac. Rep. 812.

California: *People v. Dreher*, 101 Cal. 271, 35 Pac. Rep. 867; *Harding v. Jasper*, 14 Cal. 642; *Helm v. McClure*, 107 Cal. 199, 40 Pac. Rep. 437; *Hall v. Kauffman*, 106 Cal. 451, 39 Pac. Rep.

to dedicate must clearly appear, though such intention may be shown by deed or by parol, by words or by acts. If by words, the words

756; *People v. Marin Co.*, 103 Cal. 223, 37 Pac. Rep. 203; *Smith v. San Luis Obispo*, 95 Cal. 463, 30 Pac. Rep. 591; *Eureka v. Fay*, 107 Cal. 166, 40 Pac. Rep. 235; *Latham v. Los Angeles*, 87 Cal. 514, 25 Pac. Rep. 673; *Griffiths v. Galindo*, 86 Cal. 192, 24 Pac. Rep. 1025; *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22; *Hibberd v. Mellville (Cal.)*, 33 Pac. Rep. 201; *Huffman v. Hall*, 102 Cal. 26, 36 Pac. Rep. 417.

Colorado: *Ward v. Farwell*, 6 Colo. 66; *Denver v. Clements*, 3 Colo. 472; *Starr v. People*, 17 Colo. 458, 30 Pac. Rep. 64.

District of Columbia: *Lansburgh v. Dist. of Columbia*, 8 App. D. C. 10, 24 Wash. L. Rep. 120.

Georgia: *Madison v. Booth*, 53 Ga. 609.

Illinois: *Wheatfield v. Grundmann*, 164 Ill. 250, 45 N. E. Rep. 164; *Chicago v. Chicago R. I. & P. R. Co.*, 152 Ill. 561, 38 N. E. Rep. 768; *Ottawa v. Yentzer*, 160 Ill. 509, 43 N. E. Rep. 601; *Moffett v. South Park Comm'rs*, 138 Ill. 620, 28 N. E. Rep. 975; *Chicago v. Stinson*, 124 Ill. 510, 513, 17 N. E. Rep. 43; *Bloomington v. Cemetery Asso.*, 126 Ill. 221, 18 N. E. Rep. 298; *Fisk v. Havana*, 88 Ill. 208; *Kyle v. Logan*, 87 Ill. 64; *Marcy v. Taylor*, 19 Ill. 634; *Harding v. Hale*, 61 Ill. 192; *McIntyre v. Storey*, 80 Ill. 127; *Princeton v. Templeton*, 71 Ill. 68; *Grube v. Nichols*, 36 Ill. 92; *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. Rep. 687.

Indiana: *Shellhouse v. State*, 110 Ind. 509, 11 N. E. Rep. 484; *Tucker v. Conrad*, 103 Ind. 349, 2 N. E. Rep. 803; *Bidinger v. Bishop*, 76 Ind. 244; *Steinaur v. Tell City (Ind.)*, 45 N. E. Rep. 1056.

Iowa: *Manchester v. Hoag*, 66 Iowa, 649, 24 N. W. Rep. 259; *Manderschid v. Dubuque*, 29 Iowa, 73, 4 Am. Rep. 196; *Fisher v. Beard*, 32 Iowa, 346;

Morrison v. Marquadt, 24 Iowa, 35, 92 Am. Dec. 444.

Kentucky: *Hall v. McLeod*, 2 Met. (Ky.), 98, 104, 74 Am. Dec. 400.

Louisiana: *De Grilleau v. Frawley*, 48 La. Ann. 184, 19 So. Rep. 151; *Shreveport v. Drouin*, 41 La. Ann. 867, 6 So. Rep. 656; *Leland University v. New Orleans*, 47 La. Ann. 100, 104, 16 So. Rep. 653.

Maryland: *Glenn v. Baltimore*, 67 Md. 390, 10 Atl. Rep. 70; *Baltimore v. Fear*, 82 Md. 246, 33 Atl. Rep. 637; *Pitt v. Baltimore*, 73 Md. 326, 21 Atl. Rep. 52; *Baltimore v. White*, 62 Md. 362; *Tinges v. Baltimore*, 51 Md. 600; *McCormick v. Baltimore*, 45 Md. 512; *Baltimore v. Frick*, 82 Md. 77, 33 Atl. Rep. 435.

Massachusetts: *Hayden v. Stone*, 112 Mass. 346; *Rowland v. Bangs*, 102 Mass. 299, 303; *Hobbs v. Lowell*, 19 Pick. 405, 31 Am. Dec. 145.

Michigan: *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Lee v. Lake*, 14 Mich. 12, 18, 90 Am. Dec. 220.

Minnesota: *Wilder v. St. Paul*, 12 Minn. 192.

Missouri: *Brinck v. Collier*, 56 Mo. 160; *Landis v. Hamilton*, 77 Mo. 554; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. Rep. 207; *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. Rep. 835; *Missouri Inst. v. How*, 27 Mo. 211; *Rosenberger v. Miller*, 61 Mo. App. 422; *Moore v. Hawk*, 57 Mo. App. 495; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. Rep. 735; *Baker v. Vanderburg*, 99 Mo. 378, 12 S. W. Rep. 462.

Nebraska: *Brown v. Stein (Neb.)*, 57 N. W. Rep. 401; *Graham v. Hartnett*, 10 Neb. 517, 7 N. W. Rep. 280.

New Hampshire: *State v. Nudd*, 23 N. H. 327, 337; *Barker v. Clark*, 4 N. H. 380, 335, 17 Am. Dec. 428.

New York: *In re Opening One Hundred and Sixteenth Street*, 48 Hun, 488, 73 N. Y. St. 100, 37 N. Y. Supp. 508. 1

must be unequivocal and without ambiguity. "If by acts, they must be such acts as are inconsistent and irreconcilable with any construction except the assent of the owner of such dedication."¹ Therefore, a promise by a grantor that his grantee may have a road over the grantor's land if he would fence the road, is not a dedication of the land to the public for a highway, though the grantee fences the road.² The words used indicated only a willingness of the grantor that the grantee might have a private way across his land.

As regards the owner's intention to dedicate a way to public use, his declarations at the time of or after the alleged dedication may be shown either to prove an intention to dedicate or to show that he had no such intention.³

App. Div. 436; *Wicks v. Thompson*, 13 N. Y. Supp. 651, 59 Hun, 618; *Flack v. Green Island*, 122 N. Y. 107, 33 N. Y. St. Rep. 339, 25 N. E. Rep. 267; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. Rep. 43; *Mark v. West Troy*, 76 Hun, 162, 27 N. Y. Supp. 543, 57 N. Y. St. 323.

Oregon: *Lewis v. Portland*, 25 Oreg. 133, 35 Pac. Rep. 256, 22 L. R. A. 736; *Hogue v. Albina*, 20 Oreg. 182, 25 Pac. Rep. 386; *Lowndale v. Portland*, 1 Oreg. 397, 405.

Ohio: *Gest v. Kenner*, 2 Handy, 86; *Bass Lake Co. v. Hollenbeck*, 11 Ohio C. Ct. 508; *Lake Shore & M. S. R. Co. v. Cleveland*, 1 Ohio Dec. 1, 32 Ohio L. J. 206.

Pennsylvania: *In re Bellefield Avenue*, 2 Pa. Super. Ct. 148; *Commonwealth v. Railroad Co.*, 135 Pa. St. 256, 19 Atl. Rep. 1051; *Griffin's App.* 109 Pa. St. 150; *Easton v. Rinek*, 116 Pa. St. 1, 9 Atl. Rep. 63; *Patterson v. People's Nat. Gas Co.*, 172 Pa. St. 554, 33 Atl. Rep. 575; *Weiss v. South Bethlehem*, 136 Pa. St. 294, 20 Atl. Rep. 801, 32 Am. & Eng. Corp. Cas. 64.

Rhode Island: *Union Co. v. Peckham*, 16 R. I. 64, 12 Atl. Rep. 130; *Pennington v. Willard*, 1 R. I. 93; *Daniels v. Almy*, 18 R. I. 244.

Tennessee: *Hewitt v. Pulaski (Tenn.)*, 36 S. W. Rep. 878.

Texas: *Lamar County v. Clements*, 49 Tex. 347; *Ayers v. Fellrath*, 5 Tex. Civ. App. 557, 24 S. W. Rep. 347; *San Antonio v. Sullivan*, 4 Tex. Civ. App. 451, 23 S. W. Rep. 307; *Wolf v. Brass*, 72 Tex. 133, 12 S. W. Rep. 159.

West Virginia: *Dicken v. Liverpool Salt & Coal Co.*, 41 W. Va. 511, 23 S. E. Rep. 582.

Wisconsin: *Bushnell v. Scott*, 21 Wis. 451, 94 Am. Dec. 555; *Buchanan v. Curtis*, 25 Wis. 99, 3 Am. Rep. 23; *Ca-hill v. Layton*, 57 Wis. 600, 609, 16 N. W. Rep. 1; *State v. McCabe*, 74 Wis. 481, 43 N. W. Rep. 322; *Lawe v. Kaukauna*, 70 Wis. 306, 35 N. W. Rep. 561; *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. W. Rep. 410; *Fischer v. Laack*, 76 Wis. 313, 45 N. W. Rep. 104.

¹ *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. W. Rep. 410, per Newman, J.; *McLemore v. McNeley*, 56 Mo. App. 556; *Smith v. San Luis Obispo*, 95 Cal. 463, 30 Pac. Rep. 591.

² *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. W. Rep. 410.

³ *Buchanan v. Curtis*, 25 Wis. 99, 3 Am. Rep. 23; *Lawe v. Kaukauna*, 70 Wis. 306, 35 N. W. Rep. 561; *Proctor v. Lewiston*, 25 Ill. 153; *Smith v. Flora*, 64 Ill. 93; *McIntyre v. Storey*, 80 Ill. 127; *Starr v. People*, 17 Colo. 458, 30 Pac. Rep. 64; *Baker v. Vanderburg*, 99 Mo. 378, 12 S. W. Rep. 462; *Fassion v.*

426. The owner may testify as to what his intention actually was as to dedication, and his testimony will be considered in connection with all the other facts of the circumstances.¹ It is true, however, that the testimony of the owner that he did not intend to dedicate will not be permitted to prevail against unequivocal acts and conduct on his part, inconsistent with such intent upon which the public had a right to rely.² “The vital and controlling principle is the *animus donandi*, and whenever this is plainly and unequivocally manifested on the part of the owner of the soil, either by formal declaration or by acts from which it may fairly be presumed, such as should equitably estop him from denying such intention, the dedication, so far as the owner is concerned, is complete. Without such manifestation of intent, by either of said modes, to donate the land to the use of the public, it cannot be said that a valid dedication is possible. To make a sufficient dedication the proprietor of the soil must devote the portion thereof intended for public use to such use, and on the part of the public it must be accepted and appropriated to that use. The acts on the part of the donor and of the public, of an intention to dedicate, to accept and appropriate the land to public use, where the dedication is relied upon to support some right, must be equally clear and unambiguous. A dedication is not an act of omission to assert a right, but is the affirmative act of the donor, resulting from an active, and not a passive condition of the owner’s mind on the subject.”³

In the Illinois case above cited, the court further say:⁴ “And where the owner swears to what his intention was, he can be contradicted by his acts and conduct or declarations.⁵ But the rule in this State, and perhaps generally, is, to allow the owner to testify to what his intention actually was, to be considered in connection with all the other facts and circumstances in the case.”⁶

Landrey (Ind.), 24 N. E. Rep. 96; Gilder v. Brenham, 67 Tex. 345, 3 S. W. Rep. 309; Dubois Cemetery Co. v. Griffin, 165 Pa. St. 81, 30 Atl. Rep. 840.

¹ Chicago v. Chicago, R. I. & P. R. Co., 152 Ill. 561, 38 N. E. Rep. 768; Helm v. McClure, 107 Cal. 199, 40 Pac. Rep. 437.

² Chicago v. Chicago, R. I. & P. R. Co., 152 Ill. 561, 38 N. E. Rep. 768, per Shope, J.; Denver v. Clements, 3 Colo. 472, 484.

³ Chicago v. C., R. I. & P. R. Co., 152 Ill. 561, 571, 38 N. E. Rep. 768, per Shope, J. And see Fisk v. Havana, 88 Ill. 208.

⁴ Chicago v. Chicago, Rock I. & P. Ry. Co., 152 Ill. 561, per Shope, J.

⁵ Hulett v. Hulett, 37 Vt. 581, 586; Smith v. Flora, 64 Ill. 93.

⁶ McIntyre v. Storey, 80 Ill. 127; Princeton v. Templeton, 71 Ill. 68; Bloomington v. Cemetery Asso., 126 Ill. 221, 18 N. E. Rep. 298. So in Helm

427. Whether there is a dedication may depend upon the circumstances of the particular case; but to make out a dedication, the circumstances must clearly prove an intent to make a dedication.¹

The owner of a tract of land laid out a way through it which he graded, paved and curbed, and it was lighted by city gas lamps. He built houses fronting on the street, and in the deeds and leases of the same he stated that the mention of the street was intended solely for the purpose of description, and not as a dedication of the street for public use. The way had the appearance of a city street and was used by vehicles for the accommodation of the residents thereon. The owner continued to pay taxes upon the land occupied by the way up to the time that condemnation proceedings were commenced. It was held that these circumstances did not indicate an intention on the part of the owner to dedicate the street to public use, and did not in themselves constitute a dedication.²

428. A qualification of the general rule that there must be an intention to dedicate is that the owner may be estopped by his acts, though he did not, in fact, intend to make a dedication to the public. If he has intentionally or by gross negligence led the public to believe that he has dedicated his land to public use he will

v. McClure, 107 Cal. 199, 40 Pac. Rep. 437.

¹ Bloomington v. Bloomington Sem. Asso., 126 Ill. 221, 18 N. E. 298; Gage v. Mobile & O. R. Co., 84 Ala. 224, 4 So. Rep. 415; Helm v. McClure, 107 Cal. 199, 40 Pac. Rep. 437; Baltimore v. Fear, 82 Md. 246, 33 Atl. Rep. 637; McCormick v. Baltimore, 45 Md. 522; Waggeman v. North Peoria, 155 Ill. 545, 40 N. E. Rep. 485, 42 Ill. App. 132; Chicago v. Hill, 124 Ill. 646, 17 N. E. Rep. 46; O'Connell v. Bowman, 45 Ill. App. 654; Moffett v. South Park Comm'rs, 138 Ill. 620, 28 N. E. Rep. 975; Evans v. Blankenship (Ariz.), 39 Pac. Rep. 812; Tucker v. Conrad, 103 Ind. 349, 2 N. E. Rep. 803; Biding v. Bishop, 76 Ind. 244; State v. Green, 41 Iowa, 693; McKee v. Perchment, 69 Pa. St. 342; Verona Borough v. Allegheney Val. R. Co., 152 Pa. St. 368, 25 Atl. Rep. 518; White Bear v. Stewart,

40 Minn. 284, 41 N. W. Rep. 1045; Brown v. Stein (Neb.), 57 N. W. Rep. 401; Kansas v. Adkins, 42 Kan. 203, 21 Pac. Rep. 1069; Ayers v. Fellrath, 5 Tex. Civ. App. 557, 24 S. W. Rep. 347; Matter of Opening Beach Avenue, 70 Hun, 351, 53 N. Y. St. 822, 24 N. Y. Supp. 37; Mark v. West Troy, 76 Hun, 162, 27 N. Y. S. 543, 57 N. Y. St. 323; Holdane v. Cold Spring, 21 N. Y. 474; Flack v. Green Island, 122 N. Y. 107, 33 N. Y. St. Rep. 339, 25 N. E. Rep. 267; Cook v. Harris, 61 N. Y. 448; Hogue v. Albina, 20 Oreg. 182, 25 Pac. Rep. 386, 10 L. R. A. 673, 32 Am. & Eng. Corp. Cas. 49; Lowsdale v. Portland, 1 Oreg. 397, 405.

² Baltimore v. Fear, 82 Md. 246, 33 Atl. Rep. 637. And see Pitts v. Baltimore, 73 Md. 326, 21 Atl. Rep. 52; New Albany v. Williams, 126 Ind. 1, 25 N. E. Rep. 187.

be estopped from contradicting his representations to the prejudice of those whom he has misled. "Indeed, the rule as to dedication at common law is but an application of the doctrine of *estoppel in pais*. A dedication to public use does not operate as a grant, but as an *estoppel in pais* of the owner of the servient estate from asserting a right of possession inconsistent with the uses and purposes for which the dedication was made. * * * In other words, his acts or admissions operate against him in the nature of an estoppel, when in good conscience and in honest dealing, and in justice to others he ought not to be permitted to gainsay them. But the doctrine of estoppel in fact is called into life for the purpose of preventing wrong and redressing injury, and is never carried farther than is necessary to prevent one party from being injured by his reliance on the acts or declarations of another, and therefore no declarations or acts give rise to an estoppel unless they have been relied and acted on, and unless their denial would prejudice the party in whose favor the estoppel is introduced."¹

429. A new way may be substituted for an old way, and the dedication and acceptance may be shown by use or by the circumstances of the case. "Without yielding the doctrine that the public cannot be ousted of its right by adverse possession, it is not at all inconsistent to hold that under a new dedication, another way equally convenient, has been substituted by general and long continued acquiescence, for the original way. The right of the public to a highway, without substantial detriment, is preserved, while its particular location may have been varied by common consent. The old right is not extinguished, although its exercise may be transferred to the new way. Judge Dillon puts it upon the ground of an estoppel *in pais*, but the principle of substitution appears to us to be a stronger ground."²

The old highway cannot be fenced up by the owners of the land until the new highway is made fit for use, and is accepted by use or otherwise in place of the old.³

¹ Wilder v. St. Paul, 12 Minn. 192, 200, per Wilson, C. J.

² Almy v. Church, 18 R. I. 182, 188, 26 Atl. Rep. 58, 41 Am. & Eng. C. C. 150, per Stiness, J.; Hamilton v. White, 5 N. Y. 9; Larned v. Larned, 11 Met. 421; Prouty v. Bell, 44 Vt. 72; Lovell v. Smith, 3 C. B. N. S. 120.

³ Witter v. Damitz, 81 Wis. 385, 51 N. W. Rep. 575; State v. Reesa, 59 Wis. 106, 17 N. W. Rep. 873. In West Virginia a statute regulates such changes in the route of highways. Code 1868, ch. 43, § 32; Yates v. West Grafton, 33 W. Va. 507, 11 S. E. Rep. 8.

Where one desiring to change the location of a highway across his farm offered to give the land for a new location in exchange for the old, and the town accepted the offer, and proceeded to build a bridge across a stream upon the new location, and allowed the former road to be closed up, the dedication and acceptance were regarded as complete and conclusive.¹ Where the change is made by the sole act of the landowner, as where he closes an old highway and opens a new one, he is presumed to dedicate the new way; but the public by using it are not precluded from claiming the original way, unless there has been an abandonment of that way.²

Where a road has been dedicated to and occupied by the public, a mere change in some parts as to direction does not necessarily show a reclamation by the owner.³

But the fact that the line of a road has been changed from time to time by the owner of the land for nearly its entire length is evidence that he has made no dedication of it to the public.⁴

430. The laying out of land in streets and lots, and the sale of lots abutting upon such streets constitute an incipient dedication of them to the public which neither the owner nor his successors in title can afterwards revoke;⁵ although the dedication does not

¹ *Fairfield v. Morey*, 44 Vt. 239. And see *Folsom v. Underhill*, 36 Vt. 580; *Hamilton v. White*, 5 N. Y. 9; *Sweatman v. Deadwood* (S. D.), 69 N. W. Rep. 582.

² *Dawes v. Hawkins*, 8 C. B. N. S. 848; *Gross v. McNutt* (Ida.), 38 Pac. Rep. 935; *McKenzie v. Gilmore* (Cal.), 33 Pac. Rep. 262; *Fuller v. Grand Rapids*, 105 Mich. 529, 63 N. W. Rep. 530.

³ *Harper v. State* (Ala.), 21 So. Rep. 354.

⁴ *Hibberd v. Mellville* (Cal.), 33 Pac. Rep. 201.

⁵ *Woodyer v. Hadden*, 5 Taunt. 125; *Barclay v. Howell*, 6 Pet. 498; *New Orleans v. United States*, 10 Pet. 662, 721; *Irwin v. Dixon*, 9 How. 10.

Alabama: *Ham v. Dadeville* (Ala.), 14 So. Rep. 9; *Sherer v. Jasper*, 93 Ala. 530, 9 So. Rep. 584; *Reed v. Birmingham*, 92 Ala. 339, 9 So. Rep. 161; *Evans v. Savannah & W. R. Co.*, 90 Ala. 54,

7 So. Rep. 758; *Demapolis v. Webb*, 87 Ala. 659, 6 So. Rep. 408; *Western R. Co. v. Alabama Grand Trunk R. Co.*, 96 Ala. 272, 17 L. R. A. 474.

Arizona: *Evans v. Blankenship* (Ariz.), 39 Pac. Rep. 812.

California: *Los Angeles Cemetery Asso. v. Los Angeles* (Cal.), 32 Pac. Rep. 240; *Kittle v. Pfeiffer*, 22 Cal. 484; *Logan v. Rose*, 88 Cal. 263, 26 Pac. Rep. 106; *Eureka v. Croghan*, 81 Cal. 524, 527, 22 Pac. Rep. 693; *Brown v. Stark*, 83 Cal. 636, 24 Pac. Rep. 162; *Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. Rep. 928, 23 Pac. Rep. 1085; *Griffiths v. Galindo*, 86 Cal. 192, 24 Pac. Rep. 1025; *Hoadley v. San Francisco*, 50 Cal. 265; *Stone v. Brooks*, 35 Cal. 489; *People v. Reed*, 81 Cal. 70, 22 Pac. Rep. 474; *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. Rep. 839.

Colorado: *John Mouat Lumber Co. v. Denver*, 21 Colo. 1, 40 Pac. Rep. 237.

Connecticut: *Guthrie v. New Haven*,

become complete, so as to impose upon the municipality the burden of making or keeping the streets in repair till they have been accepted by competent authority, or been used by the public

31 Conn. 308; *Derby v. Alling*, 40 Conn. 410.

Delaware: *Fulton v. Dover* (Del. Ch.), 6 Atl. Rep. 633.

Florida: *Winter v. Payne*, 33 Fla. 470, 15 So. Rep. 211.

Georgia: *Harrison v. Augusta Factory*, 73 Ga. 447.

Illinois: *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. Rep. 774.

Indiana: *Evansville v. Evans*, 37 Ind. 229; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Shanklin v. Evansville*, 55 Ind. 240.

Iowa: *Dubuque v. Maloney*, 9 Iowa, 450.

Kentucky: *West Covington v. Freking*, 8 Bush. 121; *Bogard v. O'Brien* (Ky.), 20 S. W. Rep. 1097; *Rowan v. Portland*, 8 B. Mon. 232.

Louisiana: *Armistead v. Railroad Co.*, 47 La. Ann. 1381, 17 So. Rep. 888; *Leland University v. New Orleans*, 47 La. Ann. 100, 16 So. Rep. 653.

Maine: *Bartlett v. Bangor*, 67 Me. 460; *Danforth v. Bangor*, 85 Me. 423, 27 Atl. Rep. 268; *Stetson v. Bangor*, 73 Me. 357, 60 Me. 313.

Maryland: *Hawley v. Baltimore*, 33 Md. 270; *Lippincott v. Harvey*, 72 Md. 572, 19 Atl. Rep. 641.

Michigan: *Ruddiman v. Taylor*, 95 Mich. 547, 55 N. W. Rep. 376.

Minnesota: *Hanson v. Eastman*, 21 Minn. 509; *Borer v. Lange*, 44 Minn. 281, 46 N. W. Rep. 358; *Great Northern R. Co. v. St. Paul*, 61 Minn. 1, 63 N. W. Rep. 96.

Missouri: *Buschmann v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687; *California v. Howard*, 78 Mo. 88; *Reid v. Board of Educ.*, 73 Mo. 295; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. Rep. 735.

Nebraska: *Pillsbury v. Alexander*, 40

Neb. 242, 58 N. W. Rep. 859; *Weeping Water v. Reed*, 21 Neb. 261, 31 N. W. Rep. 797; *Gregory v. Lincoln*, 13 Neb. 352, 14 N. W. Rep. 423.

New Jersey: *Price v. Plainfield*, 40 N. J. L. 608; *Clark v. Elizabeth*, 40 N. J. L. 172.

New York: *White's Bank v. Nichols*, 64 N. Y. 65; *Matter of Twenty-Ninth Street*, 1 Hill, 189; *Matter of Brooklyn & North Thirteenth St.*, 73 N. Y. 179; *Bridges v. Wyckoff*, 67 N. Y. 130; *Buffalo v. Delaware, L. & W. R. Co.*, 39 N. Y. Supp. 4; *People v. Underhill*, 144 N. Y. 316, 39 N. E. Rep. 333; *Haight v. Littlefield*, 147 N. Y. 338, 41 N. E. Rep. 696.

Ohio: *Lockland v. Smiley*, 26 Ohio St. 94; *Huber v. Gazley*, 18 Ohio, 18.

Oregon: *Carter v. Portland*, 4 Ore. 339; *Hogue v. Albina*, 20 Ore. 182, 25 Pac. Rep. 386; *Meier v. Portland C. R. Co.*, 16 Ore. 500, 19 Pac. Rep. 610, 1 L. R. A. 856; *Hicklin v. McClear*, 18 Ore. 126, 22 Pac. Rep. 1057.

Pennsylvania: *Quicksall v. Philadelphia*, 177 Pa. St. 301, 35 Atl. Rep. 609; *Schenley v. Commonwealth*, 36 Pa. St. 62; *Commonwealth v. Rush*, 14 Pa. St. 186; *In re Pearl Street*, 111 Pa. St. 565, 5 Atl. Rep. 430.

Tennessee: *Wilson v. Acree* (Tenn.), 37 S. W. Rep. 90.

Texas: *Preston v. Navasota*, 34 Tex. 684.

Vermont: *Davis v. Judge*, 46 Vt. 655; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554.

West Virginia: *Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. Rep. 130; *Pierpoint v. Harrisville*, 9 W. Va. 215.

Wisconsin: *Weisbrod v. Chicago & N. W. R. Co.*, 21 Wis. 602; *Yates v. Judd*, 18 Wis. 118, *Diedrich v. Northwestern R. Co.*, 42 Wis. 248.

for at least the period requisite for acquiring title by adverse possession.

Where a plat of land is recorded, and land appears thereon not numbered as a lot, nor corresponding in size or shape to one, but bounded by lines clearly intended to represent the lines of a street, and lots are sold as being bounded on such street, such land is dedicated for a public street, though not named as such on the plat.¹ But the making of a map or plat of one's land, on which streets and squares are shown, followed by no dealing with the land with reference to such streets or squares, is not sufficient to show a dedication of them.²

There is an implied covenant not merely that such purchaser shall have a right of way over the street upon which the granted land is situated, but that all persons may use it. The conveyance in such case operates as a dedication of the street to the use of the public forever.³ If a State, in laying out a town, reserves certain squares for public use on a plan of the town by which lots are sold, the State will be presumed to have dedicated the squares for such appropriate public uses as would be deemed to have been fairly in contemplation at the time of laying out the town and selling lots by the plan.⁴

431. The rule is general that a grant of land bounded upon a public or private way carries the title to the middle line of the way.⁵ Although a street is merely projected and represented on a map or plan, a deed of land abutting upon it passes the fee to the center of the street. But the rule is otherwise declared in some cases, which hold that a purchaser of land bounded upon a street marked upon a plan, but not actually opened, takes no title beyond the boundary

¹ *San Francisco v. Burr*, 108 Cal. 460, 36 Pac. Rep. 771; *Indianapolis v. Kingsbury*, 101 Ind. 209, 51 Am. Rep. 749.

² *Whitworth v. Berry*, 69 Miss. 882, 12 So. Rep. 146; *Sanford v. Meridian*, 52 Miss. 383; *Birmingham Mineral R. Co. v. Bessemer*, 98 Ala. 274, 13 So. Rep. 487; *Logansport v. Dunn*, 8 Ind. 378; *Vanatta v. Jones*, 42 N. J. L. 561; *Holly Grove v. Smith* (Ark.) 37 S. W. Rep. 956.

³ *Quicksall v. Philadelphia*, 177 Pa.

St. 301, 35 Atl. Rep. 609; *In re Opening of Pearl St.*, 111 Pa. St. 565, 5 Atl. Rep. 430; *Transue v. Sell*, 105 Pa. St. 604; *Earll v. Chicago*, 136 Ill. 277, 26 N. E. Rep. 370; *Mason v. Chicago*, 163 Ill. 351, 45 N. E. Rep. 567; *Wolf v. Brass*, 72 Tex. 133, 12 S. W. Rep. 159; *Ford v. Harris*, 95 Ga. 97, 22 S. E. Rep. 144.

⁴ *Commonwealth v. Beaver Borough*, 171 Pa. St. 542, 33 Atl. Rep. 112.

⁵ Section 226; 1 *Jones on Real Prop.*, §§ 449-452; *Griffiths v. Galindo*, 86 Cal. 192, 24 Pac. Rep. 1025.

line, or outer line of the street, with an easement of way over the street. "A grantee of land acquires no title in a plotted street until it is opened. The mere plotting of a street does not divest any man of his title, or add anything to any man's title. It operates, to be sure, as a notice to all owners upon the line of the contemplated street, not to place any buildings or erections in its path, and that if they do they will be allowed no damages for them when the street is opened. But until the street is opened, the title to the soil over which it is laid out remains precisely as it was before, and no new rights are acquired in consequence of it, except, indeed, as to a grantor who will be estopped by a grant of land, bounded by a plotted street, from depriving the grantee of the use of the street. When the street is actually opened, then by the well-settled law the title of an owner fronting upon it goes to the middle of it — to the *filum viae*, but the ownership thus acquired is subject to the general right of passage over it, which is vested in the public at large at the very instant of the opening. So that the moment the bordering owner acquires his title to the soil, the public acquire their title to the uses."¹

432. The fact that a grantor in describing a lot of land conveyed, refers to an unopened street as a boundary, does not necessarily amount to a dedication of such street to the public. It may be some evidence of his intention so to dedicate the land; but this should be considered in connection with the terms of the deed, the condition, value, and situation of the property, the use to which it has been put and all the attendant facts and circumstances of the transaction.² Whether there is a dedication to the public in any particular case, is a question for the jury, to be determined from a consideration of all the circumstances; the sole question as between the owner and the public being, whether there is sufficient evidence of

¹ *Hancock v. Philadelphia*, 175 Pa. St. 124, 127, per Thayer, P. J.; *Spackman v. Steidel*, 88 Pa. St. 453; *Sutherland v. Jackson*, 32 Me. 80. See also *O'Linda v. Lothrop*, 21 Pick. 292.

² *In re Opening One Hundred and Sixteenth Street*, 73 N. Y. St. 100, 37 N. Y. Supp. 508; *Cerf v. Pfefing*, 94 Cal. 131, 29 Pac. Rep. 417; *Ward v. Farwell*, 6 Colo. 66; *In re Opening of Brooklyn St.*, 118 Pa. St. 640, 12 Atl.

Rep. 664; *Easton Borough v. Rinek*, 116 Pa. St. 1, 5, 9 Atl. Rep. 63; *Baltimore v. Frick*, 82 Md. 77, 33 Atl. Rep. 435; *Field v. Mark*, 125 Mo. 502, 28 S. W. Rep. 1004; *Buschmann v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. Rep. 735; *Moses v. Sectional Dock Co.*, 84 Mo. 242; *Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. Rep. 928, 23 Pac. Rep. 1085.

intention on the owner's part to dedicate the land to public use as a highway.¹

A description of land as bounded on one side by the continuation of a side line of a street, does not constitute a dedication of the land for a street, up to and past the premises conveyed, though a continuation of the street was contemplated.² Nor is a dedication implied by a division of land represented on a map and bounded by a dotted line, which is the continuation of the center line of an existing street; a note upon the map stating that the survey and calculations were made from the center of the street, supposing that if the land were ever laid out in lots, the street would be extended.³

433. The placing of a gate across a way is evidence of an intention on the part of the owner not to dedicate it to the public use;⁴ but if the way is already in use by the public as a highway, the erection of a gate is not conclusive, and the act itself may be consistent with an intention to permit the public to use it as a highway. The fact that the gate is left open during the day and only closed at night for the purpose of preventing injury to those who use it or to prevent the public from driving upon the owner's wharf, is not inconsistent with its dedication to the public.⁵

If the owner of the land acts by express permission of a municipal officer in placing a gate across the highway, the right of the public is not lost.⁶

The fencing of a strip of land claimed to be a highway is not

¹ Ward v. Farwell, 6 Colo. 66; People v. Dreher, 101 Cal. 271, 35 Pac. Rep. 867.

² Atwood v. O'Brien, 80 Me. 447, 15 Atl. Rep. 44; Sandford v. Covington (Ky.), 14 S. W. Rep. 497.

³ Covington v. McDonald, 94 Ky. 1, 21 S. W. Rep. 235, Lewis, J., said: "All that can be reasonably inferred from the various deeds and maps is that an extension of Sixteenth street might sometime in future be made, when the owner could, at his election, dedicate his land for the purpose, or demand compensation."

⁴ Roberts v. Karr, 1 Campb. 262; Healey v. Batley, L. R. 19 Eq. 375; Lewis v. Portland, 25 Oreg. 133, 35 Pac.

Rep. 256, 22 L. R. A. 736; Hibberd v. Mellville (Cal.), 33 Pac. Rep. 201; Smithers v. Fitch, 82 Cal. 153, 22 Pac. Rep. 935; Quinn v. Anderson, 70 Cal. 454, 11 Pac. Rep. 746; Huffman v. Hall, 102 Cal. 26, 36 Pac. Rep. 417; Herhold v. Chicago, 108 Ill. 467, 6 Am. & Eng. Corp. Cas. 110; Proctor v. Lewiston, 25 Ill. 153; Commonwealth v. Newbury, 2 Pick. 51; State v. Strong, 25 Me. 297; Hall v. Baltimore, 56 Md. 187; Cook v. Hillsdale, 7 Mich. 115; State v. Green, 41 Iowa, 693.

⁵ People v. Eel River & E. R. Co., 98 Cal. 665, 33 Pac. Rep. 728; Indianapolis v. Kingsbury, 101 Ind. 200.

⁶ Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. Rep. 448.

conclusive of a dedication, though it may be some evidence of an intention to dedicate.¹

The removal of a fence or gate which the owner of a way has maintained across it is no proof of a dedication to the public, in case the owner's tenants, as well as the public, continuously use it.²

If land platted with lots and streets so designated on the plat or map remains fenced in one large tract and cultivated by the owner, and no part of it is used as a highway, and there has been no acceptance, these facts show that there has been no dedication to the public.³

434. The payment of taxes assessed by the local authorities is evidence tending to show that there has been no dedication of the land so taxed.⁴ This circumstance, however, is not entitled to much weight; and if the land has in fact been dedicated to the public, the fact that it has been taxed will not defeat the dedication.⁵

A city is estopped to claim land dedicated to public use, but never used by the public, as against one who has occupied the land and has paid taxes thereon as being his private property.⁶

435. The recording of a plat showing streets, alleys or courts, affords a presumption of a dedication of it to public use, and if there is anything further to indicate an intention that it may be devoted to public use, it will amount to a complete dedication.⁷ Thus, where a certificate indorsed on a map recited that "the alley in the rear of the front lots is for the accommodation of said lots, and the court shown as 'Darling Place' is given as a public promenade for foot

¹ *Ottawa v. Yentzer*, 160 Ill. 509, 43 N. E. Rep. 601; *Waggeman v. North Peoria*, 155 Ill. 545, 40 N. E. Rep. 485; *O'Connell v. Bowman*, 45 Ill. App. 654, 666; *Eastern Cemetery Co. v. Louisville (Ky.)*, 15 S. W. Rep. 1117; *Proctor v. Lewiston*, 25 Ill. 153.

² *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. Rep. 207. And see *Carpenter v. Gwynn*, 35 Barb. 395.

³ *Phillips v. Day*, 82 Cal. 24, 22 Pac. Rep. 976.

⁴ *Ottawa v. Yentzer*, 160 Ill. 509, 43 N. E. Rep. 601; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. Rep. 207.

⁵ *Ottawa v. Yentzer*, 160 Ill. 509, 43 N. E. Rep. 601; *Lake View v. LeBahn*, 120 Ill. 92, 9 N. E. Rep. 269; *Chicago*

v. Wright, 69 Ill. 318; *Getchell v. Benedict*, 57 Iowa, 121; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Buschman v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687; *Hannibal v. Draper*, 36 Mo. 332; *St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586; *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. Rep. 405; *Wyman v. State*, 13 Wis. 663; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. Rep. 448.

⁶ *Smith v. Osage*, 80 Iowa, 84, 45 N. W. 404, 8 L. R. A. 633.

⁷ *Ward v. Farwell*, 6 Colo. 66; *Denver v. Clements*, 3 Colo. 472; *Pettibone v. Hamilton*, 40 Wis. 402; *Flack v. Green Island*, 122 N. Y. 107, 33 N. Y. St. 339, 25 N. E. Rep. 267.

people, but not to be opened for teams or cattle," it was held that by the recording of such map both the alley and the place named became public ways.¹

"While acts of the owner outside of the execution of a map may be considered in determining the question of dedication, yet when a map is executed and recorded, and conveyances made according to it, it is not then in the power of the owner to say that the lines upon the plat have a different meaning than that which they appear to have upon the face of it. This is certainly so as to persons purchasing, in good faith, lots of the owner according to the description upon the plat and relying upon the map so drawn and executed, because none of the lines should be regarded as superfluous or meaningless."² When the dedication is accepted or acted upon by the public to such an extent that a withdrawal of the offer would operate as a fraud, the dedication becomes irrevocable.³

436. In the same way a parcel of land designated on a plat as a park, public square or common with reference to which lots fronting upon it have been sold, is irrevocably dedicated to public use.⁴

"There is no difference in the principles applicable to the dedication of public streets and a public square or park. In each case the dedication is to be considered with reference to the use to which the property may be applied or the purpose for which the dedication is made, and this may be ascertained by the designation which the owner gives to land upon the map or plat, whether it be a 'street,' 'square,' or 'park.'"⁵

437. Mere passive acquiescence by the owner of land in its use by the public for street purposes does not constitute a dedication. Such use may be some evidence of a dedication, but it does not by

¹ Pettibone v. Hamilton, 40 Wis. 402. And see Kimball v. Kenosha, 4 Wis. 321; Williams v. Smith, 22 Wis. 594; Weisbrod v. Chicago & N. W. R. Co., 21 Wis. 602.

² Great Northern R. Co. v. St. Paul, 61 Minn. 1, 63 N. W. Rep. 96, per Buck, J.

³ Great Northern R. Co. v. St. Paul, 61 Minn. 1, 63 N. W. Rep. 96.

⁴ Avondale Land Co. v. Avondale (Ala.), 21 So. Rep. 318; Attorney-General v. Abbott, 154 Mass. 323, 28 N. E. Rep. 346, 13 L. R. A. 251; Steel v.

Portland, 23 Oreg. 176, 31 Pac. Rep. 479; Carter v. Portland, 4 Oreg. 339; Goode v. St. Louis, 113 Mo. 257, 20 S. W. Rep. 1048, 40 Am. & Eng. Corp. Cas. 61; Mowry v. Providence, 10 R. I. 52; State v. Travis County, 85 Tex. 435, 21 S. W. Rep. 1029; Hoadley v. San Francisco, 50 Cal. 265; Price v. Plainfield, 40 N. J. L. 608; Mankato v. Wilbard, 13 Minn. 1, 23

⁵ Steel v. Portland, 23 Oreg. 176, 31 Pac. Rep. 479, 480, per Bean, J. And see Archer v. Salinas City, 93 Cal. 43, 28 Pac. Rep. 839, 16 L. R. A. 145.

itself constitute a dedication.¹ Mere non-action by the owner, mere omission on his part to assert title against the public, does not raise an implication of an intention to dedicate his land to public use, nor does it estop him to deny such intention.²

There must be an express or implied consent of the owner of private ways that they may become public before they can actually be transformed into public ways.³

The fact that an owner of land permitted the public generally to pass over a strip of the land, in connection with the use of the strip by himself and his tenants, does not show an intent on his part to dedicate the strip to the public use, where at times he maintained gates across the strip, and performed other acts of ownership.⁴

Where one has constructed wharves for his own use, the fact that the public have driven upon them with wagons and carriages, without objection from the owner, who has always used the wharves in connection with his business, does not show a dedication of the wharves for public use, although the municipal authorities have lighted them in the same manner as other portions of the city.⁵

438. A way established by one for his own convenience and use does not become a public way because the public also use it with the owner's permission.⁶ Thus the fact that a railroad com-

¹ Tucker v. Conrad, 103 Ind. 349, 2 N. E. Rep. 803; Frankford & S. P. City Passenger R. Co. v. Philadelphia, 175 Pa. St. 120, 34 Atl. Rep. 577; Commonwealth v. Railroad Co., 135 Pa. St. 256, 19 Atl. Rep. 1051; Hoole v. Attorney-General, 22 Ala. 190; Worthington v. Wade, 82 Tex. 26, 17 S. W. Rep. 520; San Antonio v. Sullivan, 4 Tex. Civ. App. 451, 22 S. W. Rep. 307; Gilder v. Brenham, 67 Tex. 345, 3 S. W. Rep. 309; Ramthun v. Halfman, 58 Tex. 551.

² McKey v. Hyde Park, 134 U. S. 84, 10 Sup. Ct. 512; Bloomington v. Cemetery Asso., 126 Ill. 221, 18 N. E. Rep. 298; Herhold v. Chicago, 108 Ill. 467; Kyle v. Logan, 87 Ill. 64, 66; Peyton v. Shaw, 15 Ill. App. 192; Dicken v. Liverpool Salt & Coal Co., 41 W. Va. 511, 23 S. E. Rep. 582.

³ Sarcoux v. Wild, 64 Mo. App. 403.

⁴ Field v. Mark, 125 Mo. 502, 28 S.

W. Rep. 1004; Gowen v. Phila. Exch. Co., 5 W. & S. 141; Griffin's App., 109 Pa. St. 150; Brinck v. Collier, 56 Mo. 160; Landis v. Hamilton, 77 Mo. 554; Commonwealth v. Railroad Co., 135 Pa. St. 256, 19 Atl. Rep. 1051; Bauman v. Boeckeler, 119 Mo. Sup. 189, 24 S. W. Rep. 207.

⁵ Buffalo v. Delaware, L. & W. R. Co., 39 N. Y. Supp. 4; Irwin v. Dixon, 9 How. 10; Lewis v. Portland, 25 Oreg. 133, 35 Pac. Rep. 256, 22 L. R. A. 736.

⁶ Pennsylvania Company v. Plotz, 125 Ind. 26, 24 N. E. Rep. 343; Shellhouse v. State, 110 Ind. 509, 11 N. E. Rep. 484; Ottawa v. Yentzer, 160 Ill. 509, 43 N. E. Rep. 601; Kansas City, C. & S. R. Co. v. Woolard, 60 Mo. App. 631; Stacey v. Miller, 14 Mo. 478; Field v. Mark, 125 Mo. 502, 28 S. W. Rep. 1004; Bauman v. Boeckeler, 119 Mo. 189, 24 S. W. Rep. 207; Landis v. Ham-

pany opens and grades a strip of land to be used as an approach to its station does not amount to a dedication of the ground to the public for use as a street. "To hold otherwise would be, in effect, to affirm that a dedication to the public occurs whenever a railroad company opens and prepares a convenient way over its own ground to its depot. As a matter of course, the public have rights in respect to the use of the ground, but only as the use is in some way related to travel or traffic with the railroad company."¹

If an abutting owner constructs a board walk along the side of a highway for his own convenience, mere use of it by the public is in no sense a dedication of it to the public, or evidence of its acceptance as a part of the public highway by the township, and the owner, therefore, may remove it at his pleasure.²

An owner may make a limited dedication in favor of the public, resumable at his mere pleasure, or may suffer a permissive use by the public for all purposes of passage, jointly with himself, without in any degree impairing his right to terminate such privilege at any time.³

439. The mere use by the public of a road through woodland or other vacant and uninclosed land does not create a public right of way, unless the use is shown to have been adverse. "The use of a way, for twenty years, through enclosed ground, implies that it is adverse; but when it runs entirely through unenclosed forest it is merely permissive. In the first, there is the presumption of a grant, which cannot be resisted but by proof to rebut it; in the other, this presumption does not exist but by some evidence to raise it."⁴

ilton, 77 Mo. 554; Brinck v. Collier, 56 Mo. 160; State v. Young, 27 Mo. 259; Weiss v. South Bethlehem, 136 Pa. St. 294, 20 Atl. Rep. 801, 32 Am. & Eng. Corp. Cas. 64; State v. Gross, 119 N. C. 868, 26 S. E. Rep. 91; Collins v. Patterson, 119 N. C. 602, 26 S. E. Rep. 154; Boyden v. Achenback, 79 N. C. 539; State v. Fisher, 117 N. C. 733, 23 S. E. 158; People v. Osborn, 84 Hun, 441, 32 N. Y. Supp. 358, 65 N. Y. St. 556; Gage v. Mobile & O. R. Co., 84 Ala. 224, 4 So. Rep. 415; Morse v. Ranno, 32 Vt. 600; Bowers v. Suffolk Manuf. Co., 4 Cush. 332; McCormick v.

Baltimore, 45 Md. 512; Green v. Bethea, 30 Ga. 396.

¹ Pennsylvania Company v. Plotz, 125 Ind. 26, 24 N. E. Rep. 343, 345, per Mitchell, C. J.

² Commonwealth v. Barker, 140 Pa. St. 189, 21 Atl. Rep. 243.

³ Weiss v. South Bethlehem, 136 Pa. St. 294, 20 Atl. Rep. 801, 32 Am. & Eng. Corp. Cas. 64; Gowen v. Phila. Exch. Co., 5 W. & S. 141; Griffin's App., 109 Pa. St. 150; Homer v. Riker, 79 Mich. 551, 44 N. W. Rep. 955.

⁴ Hutto v. Tindall, 6 Rich. 396, 401, per Frost, J. And see Onstott v.

The rule of dedication and acceptance by use should also be cautiously applied to roadways across wild land or across vacant city blocks. "A block of land," says Judge Dillon,¹ "often lies open in a town or city, and, for mere convenience, foot passengers, even wagons, may for years pass over it diagonally, making thereon a well-defined path or road. Ordinarily, there would be no dedication, however long this continued. But if the same amount of travel was at the end of a recorded street, and between that and another street, long use and long acquiescence would be evidence, and, if continued sufficiently long, might be conclusive evidence of a dedication."

It requires less proof to establish a street by user where such street serves to unite disconnected ends of two established streets, than where the street claimed runs diagonally across a block. The indications in the latter case would be that the use of the street was permissive, and not adverse to the rights of the owners of the land.²

440. Lapse of time for the statutory period of limitation is not necessary to show a dedication by use. All that is necessary to establish a highway is to clearly show a dedication by the owner and an acceptance by the public. If the owner of the lands knows that for some years the public has used the road as a highway and that public funds have been expended in its improvement, and he acquiesces in this use, evidence of such use and acquiescence tends to prove an actual dedication.³ It is a general rule of law that a conclusive presumption of dedication arises from the continued use of a way by the public for a length of time equal to the statutory period of limitation;⁴ but an actual dedication may be shown without

Murray, 22 Iowa, 457; *Ottawa v. Yentzer*, 160 Ill. 509, 43 N. E. Rep. 601; *Kyle v. Logan*, 87 Ill. 64; *Chicago v. Stinson*, 124 Ill. 510, 17 N. E. Rep. 43; *Brushy Mound v. McClintock*, 150 Ill. 129; *Warren v. Jacksonville*, 15 Ill. 236; *Tutwiler v. Kendall* (Ala.), 21 So. Rep. 332.

¹ *Onstott v. Murray*, 22 Iowa, 457, 469; *In Matter of Hand Street*, 52 Hun, 206, 5 N. Y. Supp. 158; *Rozell v. Andrews*, 103 N. Y. 150; *Strong v. Brooklyn*, 68 N. Y. 1; *Requa v. Rochester*, 45 N. Y. 129.

² *Waring v. Little Rock*, 62 Ark. 408, 36 S. W. Rep. 24.

³ *State v. Birmingham*, 74 Iowa, 407, 38 N. W. Rep. 121; *Fisher v. Beard*, 32

Iowa, 346; *Manderschid v. Dubuque*, 29 Iowa, 73, 4 Am. Rep. 196; *Commonwealth v. Coupe*, 128 Mass. 63, 65, per *Endicott, J.*; *Witter v. Damitz*, 81 Wis. 385, 51 N. W. Rep. 575; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. Rep. 835; *Vossen v. Dautel*, 116 Mo. 379; *Price v. Breckenridge*, 92 Mo. 378; *Buschmann v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. Rep. 735; *Hope v. Barnett*, 78 Cal. 9, 20 Pac. Rep. 245; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. Rep. 448; *San Francisco v. Scott*, 4 Cal. 114.

⁴ See §§ 457, 458.

regard to lapse of time by proving such facts and such conduct on the part of the landowner as amount to a legal dedication or estop him from denying it.¹ “ Ways by prescription and ways by dedication rest upon entirely different principles. The first is established upon evidence of user by the public, adverse and continuous, for a period of twenty years or more; from which use arises a presumption of a reservation or grant, and the acceptance thereof, or that it has been laid out by the proper authorities, of which no record exists. The second is created by the permission or gift of the owner, and, upon the acceptance of such gift by the public authorities, it becomes a way, and the owner cannot withdraw his dedication.”²

A dedication may be shown by use for a very short time under circumstances showing a conclusive appropriation of a way to public use. No particular length of time is essential to make a dedication valid and irrevocable. The dedication and acceptance may both concur on a single day. All that is needed in any case is room for the estoppel to operate.³ “ Time, therefore, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. It is not like a grant, presumed from the length of time; for if the act of dedication be unequivocal, it may take place immediately. For instance, if a man builds a double row of houses, opening into an ancient street at each end of it, makes a street between them and between the two streets, and sells or rents the houses, that is instantly a public highway. If it is accepted and used by the public in the manner intended, the dedication is complete, and it will preclude the owner and all claiming in his right from asserting any ownership inconsistent with such use.”⁴

In Massachusetts, since 1846, a highway cannot be established by dedication.⁵ Before the statute of that date a highway could be established by dedication as well as by prescriptive use for twenty

¹ *McKey v. Hyde Park*, 134 U. S. 84, 10 Sup. Ct. Rep. 512; *State v. Birmingham*, 74 Iowa, 407, 38 N. W. Rep. 121; *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. Rep. 835; *Buschmann v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. Rep. 735; *Morgan v. Railroad Co.*, 96 U. S. 716.

² *Commonwealth v. Coupe*, 128 Mass. 63, 65, per *Endicott, J.*

³ *Cook v. Harris*, 61 N. Y. 448, 454, per *Earl, C.*; *Flack v. Green Island*, 122 N. Y. 107, 33 N. Y. St. 339, 25 N. E. 267; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. Rep. 448; *Plummer v. Sheldon*, 94 Cal. 533, 29 Pac. Rep. 947.

⁴ *Ogle v. Phila., Wilm. & Balto. R. Co.*, 3 *Houst.* 267, 273, per *Gilpin, C. J.*

⁵ Act of 1846, ch. 203; P. S. 1882, ch. 49, § 94.

years. But since that statute the highway can be established only in the manner prescribed by statute or by prescriptive use, the statute not applying to ways established by prescription.¹

441. Use alone by the public is not enough to establish the fact of a dedication, unless such use is necessary for the public accommodation, and is of such extent, and is so long continued as to raise a presumption that the owner intended to dedicate to the public.²

Where an alleged highway was on or near a beach of the Atlantic ocean, and the evidence showed that only a few teams passed over it for the purpose of collecting rockweed and driftweed, and this occurred at only certain seasons of the year, that most of the way no wheel marks were distinguishable at any time, that at many points the course of travel changed from time to time as the waters washed away the soil, that the way was not fenced or repaired, or in any way recognized by the public authorities, it was held that the use furnished no evidence of a public necessity for a highway and none of a dedication to the public use.³

User alone is not sufficient of itself to establish dedication by the owner, except it appear clearly that such user was with the knowledge and consent of the owner, or without his objection, and under such circumstances as fairly to give rise to the presumption that the owner intended to dedicate to such use.⁴

The assent of the owner of land to its use by the public as a street and the actual enjoyment by the public of the use, for such a length of time that public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment, constitute a dedication.⁵

442. Long continued adverse use of a way by the public raises a presumption of the owner's consent, and of a dedication by him.⁶

¹ Commonwealth v. Coupe, 128 Mass. 63; Commonwealth v. Holliston, 107 Mass. 232; Commonwealth v. Taunton, 16 Gray, 228; Jennings v. Tisbury, 5 Gray, 73. The doctrine that a highway could be established by dedication was first declared in this State in 1837. Hobbs v. Lowell, 19 Pick. 405.

² Starr v. People, 17 Colo. 458, 30 Pac. Rep. 64; Klenk v. Walnut Lake, 51 Minn. 381, 53 N. W. Rep. 703; Case v. Favier, 12 Minn. 89.

³ State v. Nudd, 23 N. H. 327.

⁴ Demartini v. San Francisco, 107 Cal. 402, 40 Pac. Rep. 496.

⁵ Marion v. Skillman, 127 Ind. 130, 26 N. E. Rep. 676, 11 L. R. A. 55; Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Summers v. State, 51 Ind. 201; Mauck v. State, 66 Ind. 177.

⁶ Jarvis v. Dean, 3 Bing. 447; Attorney-General v. Biphosphate Co., 11 Ch. D. 327; Mann v. Brodie, L. R. 10 App. Cas., 378; Cincinnati v. White, 6 Pet.

The period of use required to raise a conclusive presumption is that requisite for the acquisition of title by adverse possession.¹ But a presumption of a dedication may arise from the use of the land by the public for a very short period.²

Where a railway company laid its track over a traveled street or road used by the public as a highway, which had not been legally laid out as such, and the public continued to use the crossing as a highway for many years, without interference by the railway company, which, on the contrary, kept it in proper repair for public use, and planked it, and built cattle-guards on each side of it, it was held that there was sufficient evidence of a dedication of the crossing for public use as a highway.³

When one has dedicated land to the public for use as a highway, he is estopped to reassert any right to the possession of the land, at least so long as it remains in the public use;⁴ although the town or city has not formally accepted the street so dedicated.⁵

The presumption of a dedication from public use is rebutted by showing that such use was not as of right, but by sufferance of the owner; or by showing that such use was only occasional and temporary, or was interrupted by the owner whenever he chose to interrupt it.⁶

443. A dedication at common law can only be made to the public.

Strictly a dedication cannot be made to an individual, or to a corporation, though the corporation acquires its rights of way for a public purpose, as in the case of a railroad company. Such a corporation cannot, in any proper sense, be regarded as constituting

431; *Mason v. Sioux Falls*, 2 S. D. 640, 51 N. W. Rep. 770; *Case v. Favier*, 12 Minn. 89.

¹ *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448; *Huffman v. Hall*, 102 Cal. 26; *Woolard v. Chymer* (Tenn.), 35 S. W. Rep. 1086; *Hunter v. Sandy Hill*, 6 Hill, 407; *Flack v. Green Island*, 122 N. Y. 107, 30 N. Y. St. 339, 25 N. E. Rep. 267; *Wickliffe v. Magruder* (Ky.), 13 S. W. Rep. 523, 12 Ky. L. Rep. 24.

² *Cincinnati v. White*, 6 Pet. 431; *Hobbs v. Lowell*, 19 Pick. 405; *Strong v. Makeever*, 102 Ind. 578, 1 N. E. Rep. 502, 4 N. E. Rep. 11; *Evansville v.*

Evans, 37 Ind. 229; *Princeton v. Templeton*, 71 Ill. 68; *Pritchard v. Atkinson*, 4 N. H. 9; *Graham v. Hartnett*, 10 Neb. 517, 7 N. W. Rep. 280.

³ *St. Paul, Minneapolis & M. R. Co. v. Minneapolis*, 44 Minn. 149, 46 N. W. Rep. 324.

⁴ *Adams v. Saratoga*, 11 Barb. 414; *Moose v. Carson*, 104 N. C. 431, 10 S. E. Rep. 689.

⁵ *Grogan v. Hayward*, 4 Fed. Rep. 161; *Moose v. Carson*, 104 N. C. 431, 10 S. E. Rep. 689.

⁶ *Huffman v. Hall*, 102 Cal. 26, 36 Pac. Rep. 417.

the public, or any portion of the public, to which common-law dedications of land can be made.¹ “At the common law they were confined to the purpose of highways, but in this country the doctrine has a wider application, and its limits have been judicially defined as extending to public squares, common lots, burying grounds, school lots, and lots for church purposes and pious and charitable uses generally, and in many cases where the use was, either expressly or from the necessity of the case, limited to a small portion of the public. But we are referred to no decision, and we think none can be found, where a dedication of this character, made for any other purpose than one strictly public, has been sustained.”² Though a railroad corporation is charged with public duties, its property is private property, acquired for the purposes of a private enterprise. “The corporation, for its own profit and advantage, accepts the franchises offered by the State, and assumes to perform the functions and duties required by the State, but with its own property. The ownership of the property is private, though the use required to be made of it is public. The private ownership prevents the acquisition of it by dedication.”³

A dedication cannot be made to a part only of the public, as, for instance, to a parish.⁴ A permission to a certain part of the public to use a way is a license and not a dedication.⁵ It is not necessary that all the public should actually use a way to constitute it a public highway, but only that its use should be open to the public in general.⁶

444. A dedication can only be made by the owner of the land in fee.⁷ A mortgagor as against the mortgagee and those claiming

¹ Lake Erie & Western R. Co. v. Whitham, 155 Ill. 514, 529, 40 N. E. Rep. 1014, 28 L. R. A. 612, 46 Am. St. Rep. 355. Also Louisville, St. L. & T. R. Co. v. Stephens, 96 Ky. 401, 16 Ky. L. Rep. 552, 29 S. W. Rep. 14, 49 Am. St. Rep. 303; Watson v. Chicago, M. & St. P. Ry. Co., 46 Minn. 321, 48 N. W. Rep. 1129, 46 Am. & Eng. R. Co. 543; Todd v. Pittsburg, F. W. & C. R. Co., 19 Ohio St. 514; California Acad. of Sci. v. San Francisco, 107 Cal. 334, 40 Pac. Rep. 426.

² Lake Erie & Western R. Co. v. Whitham, 155 Ill. 514, 529, 40 N. E. Rep. 1014, per Bailey, J.

³ Watson v. Chicago, M. & St. P. R. Co., 46 Minn. 321, 48 N. W. Rep. 1129, 46 Am. & Eng. R. Co. 543.

⁴ Poole v. Huskinson, 11 M. & W. 827; Bermondsey v. Brown, L. R. 1 Eq. 204.

⁵ White v. Bradley, 66 Me. 254.

⁶ Ward v. Davis, 3 Sandf. 502.

⁷ Nelson v. Madison, 3 Biss. 244; Lowsdale v. Portland, Deady, 1, 39; Hoole v. Attorney-General, 22 Ala. 190; Edwardsville v. Barnsback, 66 Ill. App. 381; Kyle v. Logan, 87 Ill. 64; Shields v. Ross, 158 Ill. 214, 226, 41 N. E. Rep. 985; Elson v. Comstock, 150 Ill. 303, 37 N. E. Rep. 207; Hawthorn v. Myers, 18 Ky. L. Rep. 608, 37 S. W.

under him cannot make a valid dedication, although the mortgagor is the owner as to all other persons, and they cannot object to his dedication. The mortgagee may make the dedication good by assenting to it.¹

One in the actual possession and occupancy of land, but not owning the legal title, cannot make an effectual dedication.² But a dedication by one not having the legal title may become effective on the subsequent vesting of the legal title in him and an acceptance by the public authorities.³ The after-acquired title "feeds the estoppel."⁴

But one having an equitable title to land may make a valid dedication of it to the public if he ratifies and confirms the first appropriation of it after he has obtained the legal title.⁵ And one who is acquiring title under the homestead laws of the United States may make a good dedication of a portion of it for public use if he ratifies and confirms it after obtaining a patent to the land, in case the public has accepted the dedication and used the land continuously both before and after the issue of the patent.⁶ But such a dedication is ineffectual unless the person making it afterwards acquires full title to the land and ratifies the previous dedication.⁷

If one having title to but half of a street sixty-six feet in width attempts to dedicate the whole street his dedication as to the half of

Rep. 593; *Boerner v. McKillip*, 52 Kan. 508, 35 Pac. Rep. 5; *Ritchie v. Kansas, N. & D. R. Co.*, 55 Kan. 36, 39 Pac. Rep. 718; *Brooks v. Topeka*, 34 Kan. 277, 8 Pac. Rep. 392; *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. Rep. 835; *McShane v. Moberly*, 79 Mo. 41; *Warren v. Brown*, 31 Neb. 8, 47 N. W. Rep. 633; *Niagara Falls Co. v. Backman*, 66 N. Y. 261; *Holdane v. Cold Springs*, 21 N. Y. 474; *Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931; *Church v. Portland*, 18 Ore. 73, 22 Pac. Rep. 528, 27 Am. & Eng. Corp. Cas. 29, 6 L. R. A. 259; *Bushnell v. Scott*, 21 Wis. 457, 94 Am. Dec. 555.

¹ *Roberts v. Columbia, G. & S. T. Turnpike Co. (Tenn.)*, 38 S. W. Rep. 587; *Hoole v. Attorney-General*, 22 Ala. 190.

² *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. Rep. 835; *Sarcoxie v. Wild*, 64 Mo. App. 403; *McShane v. Moberly*, 79 Mo. 41; *Hannibal v. Draper*, 36 Mo. 332; *Kyle v. Logan*, 87 Ill. 64; *Ward v. Davis*, 3 Sandf. 502. See, however, *Benn v. Hatcher*, 81 Va. 25.

³ *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. Rep. 835.

⁴ *Napa v. Howland*, 87 Cal. 84, 25 Pac. Rep. 247.

⁵ *Cincinnati v. White*, 6 Pet. 431; *Wright v. Tukey*, 3 Cush. 290.

⁶ *Hagaman v. Dittmar*, 24 Kan. 42; *Logan v. Rose*, 88 Cal. 263, 26 Pac. Rep. 106.

⁷ *Smith v. Smith*, 34 Kan. 293, 8 Pac. Rep. 385.

the street which he does not own fails, but the dedication holds good as to the other half.¹

A dedication by a lessee without the consent or ratification of the owner in fee is not binding upon him. Even a dedication by a lessee holding under a lease for the term of ninety-nine years, and the use of the way by the public during that time is not binding upon the reversioner, but he may, at the expiration of the lease, enter and close the way;² unless the circumstances are such that the reversioner would be presumed to have had notice of the public use, and to have consented to such use.³

A dedication by a lessee is binding upon him and his assigns during his term.⁴

One having merely a right of way, whether appurtenant or in gross, cannot transfer such an interest to the public as to authorize the use of the way as a public highway.⁵

The fact of dedication does not depend entirely upon the acts of the owner at the time the public first used the land as a highway, but it may be established by the acts of his successors in title.⁶

If one making a dedication for a street owns a part only of the land dedicated, the dedication is good as to that part of the land owned by him, but void as to the part not so owned.⁷

445. Corporations having public duties, and trustees holding lands for public uses, may dedicate lands to the public for highways, when such use is not inconsistent with the purposes for which the lands were held in trust, or incompatible with the duties required of the corporations.⁸ A railroad company may dedicate a highway across land acquired for its right of way,⁹ although such right of way was granted by congress through public lands in aid of the construction of the road.¹⁰ "Railroad corporations have the same

¹ Shields v. Ross, 158 Ill. 214, 41 N. E. Rep. 985.

² Wood v. Veal, 5 B. & Ald. 454; Baxter v. Taylor, 4 B. & Ad. 72.

³ King v. Barr, 4 Camp. 16; Jarvis v. Dean, 3 Bing. 447.

⁴ Attorney-General v. Biphosphate Co., 11 Ch. D. 327, 338.

⁵ White v. Wiley, 13 N. Y. Supp. 205, 59 Hun, 618.

⁶ Wheatfield v. Grundmann, 164 Ill. 250, 45 N. E. Rep. 164; Stone v. Brooks, 35 Cal. 489.

⁷ Earll v. Chicago, 136 Ill. 277, 26 N. E. Rep. 370.

⁸ Rex v. Leake, 5 B. & Ad. 469; Grand Surrey Canal Co. v. Hall, 1 Man. & G. 392; Grand Junction Canal Co. v. Petty, 21 Q. B. D. 273.

⁹ State v. Bayonne, 52 N. J. L. 503, 20 Atl. Rep. 69, 43 Am. & Eng. R. Cas. 176.

¹⁰ Northern Pac. R. Co. v. Spokane, 12 C. Ct. A. 246, 64 Fed. Rep. 506, 56 Fed. Rep. 915; Lake Erie & W. R. Co. v. Boswell, 137 Ind. 336, 36 N. E. Rep.

rights to dedicate their lands to public use as any other proprietors, unless it is contrary to the provisions of their charters, or amounts to a breach of their duty to their stockholders.”

II. *Statutory Dedication.*

446. A statutory dedication is one made in conformity with statutory provisions, which must be substantially complied with. Under these provisions the dedication is generally required to be evidenced by maps or plats acknowledged by the landowner before an officer designated, and then recorded. A statutory dedication is invalid if the requirements are not followed;² but a dedication which is defective and invalid as a statutory dedication, may, when the evidence is sufficient, be sustained as a dedication at common law.³

Thus, an acknowledgment of a plat made by the attorney in fact of the owner is not a compliance with a statute requiring such acknowledgment by the owner and does not operate as a statutory dedication of the street, but it is good as a common-law dedication when the owner conveys the abutting land by such plat.⁴

But, generally, the making of a plat showing a division of land into lots with streets, in a manner insufficient to establish a statutory dedication, does not make a dedication at common law, so long as

1103; *People v. Eel River & E. R. Co.*, 98 Cal. 665, 33 Pac. Rep. 728; *Los Angeles Cemetery Asso. v. Los Angeles*, 95 Cal. 420, 30 Pac. Rep. 523; *Green v. Canaan*, 29 Conn. 157, 166.

¹ *Northern Pac. R. Co. v. Spokane*, 12 C. Ct. A. 246, 64 Fed. Rep. 506, per Gilbert, J.; *Green v. Canaan*, 29 Conn. 157; *Williams v. N. Y. & N. H. R. Co.*, 39 Conn. 509.

² *Railroad Co. v. Schurmeier*, 7 Wall. 272; *Downer v. St. Paul & Chicago R. Co.*, 22 Minn. 251; *Winona v. Huff*, 11 Minn. 119; *Baker v. St. Paul*, 8 Minn. 491; *Belleville v. Stookey*, 23 Ill. 441; *Gosselin v. Chicago*, 103 Ill. 623; *Gebhardt v. Reeves*, 75 Ill. 301; *Blair v. Carr*, 162 Ill. 362, 44 N. E. Rep. 720; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Vermont Village v. Miller*, 161 Ill. 210, 43 N. E. Rep. 975; *Earll v. Chicago*, 136 Ill. 277, 26 N. E. Rep. 370;

Grandville v. Jenison, 84 Mich. 54, 47 N. W. Rep. 600, aff'd 49 N. W. Rep. 544; *Burton v. Martz*, 38 Mich. 761.

³ *Banks v. Ogden*, 2 Wall. 57; *Noyes v. Ward*, 19 Conn. 250; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. Rep. 735; *Maywood Co. v. Maywood*, 118 Ill. 61, 6 N. E. Rep. 866; *Marsh v. Fairbury*, 163 Ill. 401, 45 N. E. Rep. 236; *State v. Minneapolis & M. R. Co.*, 62 Minn. 450, 64 N. W. 1140; *Pillsbury v. Alexander*, 40 Neb. 242, 58 N. W. Rep. 859; *Earll v. Chicago*, 136 Ill. 277, 26 N. E. Rep. 370; *Borer v. Lange*, 44 Minn. 281, 46 N. W. Rep. 358; *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. Rep. 774; *Giffen v. Olathe*, 44 Kan. 342, 24 Pac. Rep. 470.

⁴ *Earll v. Chicago*, 136 Ill. 277, 26 N. E. Rep. 370; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. Rep. 373.

the owner retains control of the land, and does not, by a sale of lots with reference to the plat to the streets so laid out, estop himself from claiming that such streets are not open and public.¹

447. Under a statutory dedication, the public rights accrue immediately upon the fulfillment of the requirements of the statute. In several States the title in fee passes by a statutory dedication; while a common-law dedication always leaves the legal title in the original owner.² If such dedication is made before the town in which the land lies has a corporate existence, the fee remains in abeyance, and will vest in the corporation as soon as it is created.³ Dedications to the public use are good without a donee to take the title. If occasion requires, the legislature as well as a court of chancery may appoint trustees who may maintain actions in regard to the title.⁴

The plat made in conformity with the statute has all the force of an express grant, and operates to convey the title in the property for the uses and purposes intended.⁵ Acceptance by the public is not necessary to complete the dedication. In this respect a statutory dedication differs from a common-law dedication.⁶

A plat showing land divided into lots with streets traversing the same, with a block in the center not subdivided into streets, but designated as a park, operates as a statutory dedication of that block for a park, the plat being acknowledged and recorded in the manner required for a statutory dedication.⁷

¹ *Mason v. Chicago*, 163 Ill. 351, 45 N. E. Rep. 567; *Earl v. Chicago*, 136 Ill. 277, 26 N. E. Rep. 370; *Hamilton v. Chicago, B. & Q. R. Co.*, 124 Ill. 235, 15 N. E. Rep. 854; *Zearing v. Raber*, 74 Ill. 409.

² *Gosselin v. Chicago*, 103 Ill. 623; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Gebhardt v. Reeves*, 75 Ill. 301; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Maywood Co. v. Maywood*, 118 Ill. 61, 6 N. E. Rep. 866; *Marsh v. Fairbury*, 163 Ill. 401, 45 N. E. Rep. 236; *Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90; *Littler v. Lincoln*, 106 Ill. 353; *Baker v. St. Paul*, 8 Minn. 491, 493; *Reid v. Board of Education*, 73 Mo. 295; *Brown v. Carthage*, 128 Mo. 10, 30 S. W. Rep. 312; *Fulton v. Mehrenfeld*, 8 Ohio St. 440.

³ *Gebhardt v. Reeves*, 75 Ill. 301; *Brooklyn v. Smith*, 104 Ill. 429; *Marsh v. Fairbury*, 163 Ill. 401, 45 N. E. Rep. 236.

⁴ *Bryant v. McCandless*, 7 Ohio, 476; *Carpenteria School Dist. v. Heath*, 56 Cal. 478.

⁵ *United States v. Ill. Cent. R. Co.*, 154 U. S. 225, 14 S. Ct. 1015; *Elson v. Comstock*, 150 Ill. 303, 37 N. E. Rep. 207; *Zinc Company v. La Salle*, 117 Ill. 411, 2 N. E. Rep. 406, 8 N. E. Rep. 81; *Chicago v. Rumsey*, 87 Ill. 348; *Gebhardt v. Reeves*, 75 Ill. 301; *Canal Trustees v. Havens*, 11 Ill. 554.

⁶ *Reid v. Board of Education*, 73 Mo. 295; *Fulton v. Mehrenfeld*, 8 Ohio St. 440.

⁷ *Ehmen v. Gothenburg (Neb.)*, 70 N. W. Rep. 237. See, however, *Elson v. Comstock*, 150 Ill. 303, 37 N. E. Rep.

448. By statute in some States, a private road or alley may be established as a highway, primarily for the use of the person or persons to be benefited thereby, and at his or their expense; but such private road is subject to public use as a thoroughfare.¹

Such alley may be dedicated to the public in the same way that a street is dedicated, and slight evidence of acceptance by use is sufficient, in case the occasion for use by the public is slight.²

Under statutes authorizing the laying out of private roads under the surface of the ground to coal mines or to mines of iron ore and other minerals, the private road cannot be laid out partly over and partly under the surface.³

An act which provides for the condemnation of land for private ways is unconstitutional. "A private use cannot be transformed into a public one by a mere legislative declaration. As the act assumes to authorize the seizure of the property of one citizen for the benefit of another, it cannot be upheld."⁴

III. *Acceptance of Dedication.*

449. An acceptance by the public of a dedication of a highway is necessary in order to constitute the way a public one.⁵ Such acceptance, however, need not be formal, but may be shown by

207, where it did not appear that lots fronting upon the park had been conveyed, and it was said that whether or not the owner had made a dedication to the public and was estopped from denying this by reason of his receiving and making conveyances with reference to the plat, was a question.

¹ As in *Missouri R. S.* 1889, § 8559; *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. Rep. 656.

² *Taraldson v. Lime Springs*, 92 Iowa, 187, 60 N. W. Rep. 658.

³ *Palmer's Private Road*, 16 Pa. Co. Ct. 340.

⁴ *Logan v. Stogdale*, 123 Ind. 372, 24 N. E. Rep. 135; *Wild v. Deig*, 43 Ind. 455 13 Am. Rep. 399; *Stewart v. Hartman*, 46 Ind. 331; *Blackman v. Halves*, 72 Ind. 515.

⁵ *Cubitt v. Maxse*, L. R. 8 C. P. 704; *Attorney-General v. Biphosphate Co.*, 11 Ch. D. 327, 340.

Alabama: *Birmingham Mineral R. Co. v. Bessemer*, 98 Ala. 274, 13 So. Rep. 487.

California: *Helm v. McClure*, 107 Cal. 199, 40 Pac. Rep. 437; *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. Rep. 839, 16 L. R. A. 145; *People v. Reed*, 81 Cal. 79, 22 Pac. Rep. 474; *San Francisco v. Canavan*, 42 Cal. 541; *Logan v. Rose*, 88 Cal. 263, 26 Pac. Rep. 106; *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. Rep. 47.

Colorado: *Trine v. Pueblo*, 21 Colo. 102, 39 Pac. Rep. 330; *Denver v. Denver & S. F. R. Co.*, 17 Colo. 583, 31 Pac. Rep. 338.

Illinois: *O'Connell v. Bowman*, 45 Ill. App. 654; *Shields v. Ross*, 158 Ill. 214, 41 N. E. Rep. 985; *Willey v. People*, 36 Ill. App. 609; *Illinois Ins. Co. v. Littlefield*, 67 Ill. 368; *Forbes v. Balenseifer*, 74 Ill. 183; *Princeton v. Templeton*, 71 Ill. 68; *Chicago v*

circumstances, such as long continued use by the public, by improvements or repairs of the way, by grading, macadamizing, building, or the like, or by the taking charge of the road by the proper public officials.¹ Where there has been a dedication of a highway

Chicago, R. I. & P. R. Co., 152 Ill. 561, 38 N. E. Rep. 768; Chicago v. Drexel, 141 Ill. 89, 30 N. E. Rep. 774.

Indiana: Steinaur v. Tell City (Ind.), 45 N. E. Rep. 1056; Tucker v. Conrad, 103 Ind. 349, 2 N. E. Rep. 803; Ross v. Thompson, 78 Ind. 90; Mansur v. Haughey, 60 Ind. 364; Mansur v. State, 60 Ind. 357; Pennsylvania R. Co. v. Plotz, 125 Ind. 26, 24 N. E. Rep. 343.

Iowa: Des Moines v. Hall, 24 Iowa, 234, 243; Wilson v. Sexon, 27 Iowa, 15; Manderschied v. Dubuque, 29 Iowa, 73, 4 Am. Rep. 196; Bell v. Burlington, 68 Iowa, 296, 27 N. W. Rep. 245.

Maine: Mayberry v. Standish, 56 Me. 342; Dorman v. Bates Manuf. Co., 82 Me. 438, 19 Atl. Rep. 915.

Massachusetts: Hayden v. Stone, 112 Mass. 346; Bowers v. Suffolk Manuf. Co., 4 Cush. 332; Hobbs v. Lowell, 19 Pick. 405, 31 Am. Dec. 145; Hall v. McLeod, 2 Met. 98, 74 Am. Dec. 400. See G. S. 1882, §§ 71, 94; Corey v. Wrentham, 164 Mass. 18, 41 N. E. Rep. 101.

Michigan: Baker v. Johnston, 21 Mich. 319; Field v. Manchester, 32 Mich. 279.

Minnesota: Kennedy v. LeVan, 23 Minn. 513.

Missouri: Kansas City Milling Co. v. Riley, 133 Mo. 574, 34 S. W. Rep. 835; Meiners v. St. Louis, 130 Mo. 274, 32 S. W. Rep. 637; Landis v. Hamilton, 77 Mo. 554; Bauman v. Boeckeler, 119 Mo. 189, 24 S. W. Rep. 207; Baker v. Vanderburg, 99 Mo. 378, 12 S. W. Rep. 462.

Nebraska: Warren v. Brown, 31 Neb. 8, 47 N. W. Rep. 633; Graham v. Hartnett, 10 Neb. 517, 7 N. W. Rep. 280.

New Jersey: State v. South Amboy (N. J. L.), 30 Atl. Rep. 628; Attorney-

General v. Morris & E. R. Co., 19 N. J. Eq. 386; Pope v. Union, 18 N. J. Eq. 282.

New York: People v. Underhill, 144 N. Y. 316, 324, 39 N. E. Rep. 333; Niagara Falls Bridge Co. v. Backman, 66 N. Y. 261; Cook v. Harris, 61 N. Y. 448; Holdane v. Cold Spring, 21 N. Y. 474; Speir v. New Utrecht, 121 N. Y. 420, 24 N. E. Rep. 692; Matter of Opening Beach Avenue, 70 Hun, 351, 53 N. Y. St. 822, 24 N. Y. Supp. 37; Cohoes v. Del. & H. Canal Co., 54 Hun, 558.

North Carolina: Davis v. Ramsey, 5 Jones, 236; State v. Fisher, 117 N. C. 733, 23 S. E. Rep. 158.

South Carolina: Hutto v. Tindall, 6 Rich. 396.

Tennessee: Scott v. Cheatham, 12 Heisk. 713.

Texas: Galveston v. Williams, 69 Tex. 449, 6 S. W. Rep. 860; Gilder v. Brenham, 67 Tex. 345, 3 S. W. Rep. 309; French v. Scheuber, 6 Tex. Civ. App. 617, 26 S. W. Rep. 133.

Vermont: Dodge v. Stacy, 39 Vt. 558.

Virginia: Commonwealth v. Kelly, 8 Gratt. 632.

West Virginia: Dicken v. Liverpool Salt & Coal Co., 41 W. Va. 511, 23 S. E. Rep. 582.

Wisconsin: Mahler v. Brumder, 92 Wis. 477, 66 N. W. Rep. 502, 31 L. R. A. 695; Eastland v. Fogo, 66 Wis. 133, 27 N. W. Rep. 159, 28 N. W. Rep. 143; Hanson v. Taylor, 23 Wis. 547; Connehan v. Ford, 9 Wis. 240; Milwaukee v. Davis, 6 Wis. 377.

¹ Warren v. Jacksonville, 15 Ill. 236; Gentleman v. Soule, 32 Ill. 271; Littler v. Lincoln, 106 Ill. 353; Forbes v. Balenseifer, 74 Ill. 183; Grube v. Nichols, 36 Ill. 92; Hamilton v. Chicago, B. & C. R. Co., 124 Ill. 235, 15 N. E. Rep.

and this appears to be beneficial to the public, acceptance will be presumed from slight circumstances.¹

The reincorporation of a town, "as the same has been or may be laid off in lots, streets and alleys," furnishes proof of the acceptance of the dedication to the public of the streets and alleys previously laid off.²

450. In some cases an acceptance by the public of land dedicated to use as a highway has been established by use alone, without any action on the part of the municipal officers.³ It has even been held that travel upon such way to such an extent and for such a length of time as to show that the public convenience requires the road, is effectual as an acceptance; and that this time may be less than the statutory period of limitation. "It was at one time in England supposed that it was necessary for the inhabitants of the parish in which a highway was claimed to be established by dedication, to adopt or accept it by repairing it, or in some other mode, and that otherwise the parish would not be bound to repair it. And, perhaps, this idea may have been followed in some of the States, where it has been held that towns, or other municipal bodies standing in the same situation as English parishes in respect to the repair of highways, must in some mode be shown to have adopted a highway established by dedication. But this has never been considered as the law in Connecticut."⁴

Even in case an acceptance by formal adoption by the public

854; *Ross v. Thompson*, 78 Ind. 90; *Milwaukee v. Davis*, 6 Wis. 377; *Price v. Breckenridge*, 92 Mo. 378, 5 S. W. Rep. 20; *People v. Loehfelm*, 102 N. Y. 1, 5 N. E. Rep. 783; *Waring v. Little Rock*, 62 Ark. 408, 36 S. W. Rep. 24; *Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. Rep. 130; *Cass County v. Banks*, 44 Mich. 467, 7 N. W. Rep. 49; *State v. Fisher*, 117 N. C. 733, 23 S. E. Rep. 158.

¹ *Mann v. Elgin*, 24 Ill. App. 419; *Hall v. Meriden*, 48 Conn. 416; *Guthrie v. New Haven*, 31 Conn. 308.

² *Depriest v. Jones (Va.)*, 21 S. E. Rep. 478.

³ *King v. Leake*, 5 B. & Ad. 469; *Buchanan v. Curtis*, 25 Wis. 99, 3 Am. Rep. 23; *Attorney-General v. Abbott*, 154 Mass. 323, 28 N. E. Rep. 346, 13 L.

R. A. 251; *Smith v. Flora*, 64 Ill. 93; *Iselin v. Starin*, 71 Hun. 164, 24 N. Y. Supp. 748; *Los Angeles Cemetery Co. v. Los Angeles (Cal.)*, 32 Pac. Rep. 240, where the user was for four years only; *Carpenteria School Dist. v. Heath*, 56 Cal. 478; *San Francisco v. Canavan*, 42 Cal. 541; *Stone v. Brooks*, 35 Cal. 489; *San Francisco v. Scott*, 4 Cal. 114; *Kennedy v. LeVan*, 23 Minn. 513, 3 Am. Rep. 23; *Harrison County v. Seal*, 66 Miss. 129, 5 So. Rep. 622, 3 L. R. A. 659; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. Rep. 207; *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. Rep. 835; *Buschmann v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687.

⁴ *Green v. Canaan*, 29 Conn. 157, 163, per *Hinman, J.*

authorities be essential, as it is in some States, in order to impose on the public the duty of maintaining and keeping in repair, yet if in fact there has been a dedication, and in the estimation of the authorities the wants and convenience of the public require the land to be used for the purpose of a highway, they may use it for that purpose and thus cut off the owner from retraction.¹

In Iowa a public way cannot be established by user alone,² for the statute provides that use shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be proved by evidence distinct from and independent of the use, and that the party against whom the claim is made had express notice thereof.³ But if a dedication be shown, the use of the highway following the dedication will be presumed to be under that, and therefore adverse.⁴

451. But generally use alone of a way by the public does not alone constitute an acceptance, unless it is long continued and the way is essential to the public convenience.⁵ Use by the public is merely evidence tending to prove acceptance. This is especially true as regards streets in cities and towns. "As to country roads which are not so directly and immediately under the official control of any board or local legislation, and where the expenditures to keep them up are comparatively small, public user alone may, perhaps, properly be held, when sufficiently general and long continued,

¹ Hoboken Land Co. v. Hoboken, 36 N. J. L. 540; Harrison County v. Seal, 66 Miss. 129, 5 So. Rep. 622, 3 L. R. A. 659.

² State v. Mitchell, 58 Iowa, 567, 12 N. W. Rep. 598; Zigefoose v. Zigefoose, 69 Iowa, 391, 28 N. W. Rep. 654.

³ 1 R. S. 1888, § 3206.

⁴ Gerberling v. Wunnenberg, 51 Iowa, 125, 49 N. W. Rep. 861; State v. K. C., St. J. & C. B. R. Co., 45 Iowa, 139; State v. Birmingham, 74 Iowa, 407, 38 N. W. Rep. 121. In State v. Mitchell, *supra*, the following quotation from Endicott, J., in Commonwealth v. Coupe, 128 Mass. 63, is made: "Ways by prescription, and ways by dedication rest upon entirely different principles. The first is established upon evidence of use by the public adverse and con-

tinuous, for a period of twenty years or more; from which use arises a presumption of a reservation or grant, and the acceptance thereof, or that it has been laid out by the proper authorities, of which no record exists. The second is created by the permission or gift of the owner, and upon the acceptance of such gift by the public authorities it becomes a way, and the owner cannot withdraw his dedication."

⁵ Detroit v. Detroit & M. R. Co., 23 Mich. 173; Commonwealth v. Railroad Co., 135 Pa. St. 256, 19 Atl. Rep. 1051; Matter of Opening Beach Avenue, 70 Hun, 351, 53 N. Y. St. 822, 24 N. Y. Supp. 37; Albert v. Gulf, C. & S. F. R. Co. (Tex.), 21 S. W. Rep. 779; Ramthun v. Halfman, 58 Tex. 551.

to constitute an acceptance of a dedication to such public use; but this in many, if not most, of the States, depends much, if not wholly, upon statutes which recognize the public user for a certain specified period, as of itself constituting a highway, and, therefore, may be said to leave no question of acceptance open to the authorities.”¹

Where the owner of land laid it out into lots with streets, and caused a map to be made of it, and sold lots with reference to the map, but there was no evidence that the public had ever actually used the streets so laid out as highways, and the municipal authorities had instituted proceedings to take the land for streets, it was held that there had been no such user by the public or acceptance by the municipality as would make an alleged dedication of the land complete.²

452. It is not necessary that user should continue for any special time in order to show an acceptance, but its continuance must be shown for such time and under such circumstances that the public accommodation and public rights would be materially affected by an interruption of the enjoyment.³

It is not essential that the land dedicated to the public for a street should be used for that purpose within any limited time in the absence of any condition to that effect.⁴ But a failure for a long time either to use or improve a street which has been platted and offered for dedication by the owner, and the use of the street by the owner for private purposes, may be taken as *prima facie* showing that there is no intention to accept the dedication.⁵

If a dedication has been accepted, the continued possession of the dedicator will not be presumed to be adverse, and the public right is not lost by a delay for more than seven years in opening the street for public use.⁶

If a dedication of streets is made by a deed to a county, and is declared to be upon the express consideration that the county shall “accept, declare, duly establish, and use the same as public

¹ Detroit v. Detroit & M. R. Co., 23 Mich. 173, 209, per Christiancy, J.

² Fulton v. Dover, 8 Houst. 78, 31 Atl. Rep. 974.

³ Rosenberger v. Miller, 61 Mo. App. 422; Meiners v. St. Louis, 130 Mo. 274, 32 S. W. Rep. 637.

⁴ Baltimore v. Frick, 82 Md. 77, 33 Atl. Rep. 435; McCormick v. Baltimore, 45 Md. 512.

⁵ John Mouat L. Co. v. Denver, 21 Colo. 1, 40 Pac. Rep. 237.

⁶ Little Rock v. Wright, 58 Ark. 142, 32 S. W. Rep. 876.

highways," and the terms of the dedication are not complied with for ten years, the offer of dedication may be revoked and the owner may enclose the space of lands laid out as a road.¹

453. The construction or repair of the way by the public authorities is strong evidence of acceptance by the public, though not conclusive.²

An acceptance of a street dedicated by the owners and laid out on a city plan but not physically opened over the land, is shown by the passing of an ordinance by the city council for the laying of a sewer through the street. Such act is clearly an acceptance of the dedication, and a recognition of the street as a highway; and it is just as effectual and conclusive as if an ordinance had been passed to open the street and damages had been assessed and paid.³

The building of a culvert in a road by the road supervisor, and the use of the road by the public for a year or more shows an acceptance of it as a public highway.⁴

454. Until acceptance the intended dedication is revocable, as to any part of the proposed street, at the pleasure of the proprietor or abutting owners offering the same.⁵ On the other hand,

¹ Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. Rep. 770.

² King v. Leake, 5 B. & Ad. 469; Roberts v. Hunt, 15 Q. B. 17; Howard v. State, 47 Ark. 431, 2 S. W. Rep. 331; Spaulding v. Wesson (Cal.), 45 Pac. Rep. 807; People v. Marin County, 103 Cal. 223, 37 Pac. Rep. 203; Bolger v. Foss, 65 Cal. 250, 3 Pac. Rep. 871; Salida v. McKinna, 16 Colo. 523, 27 Pac. Rep. 810; Lansburgh v. Dist. of Columbia, 8 App. D. C. 10, 24 Wash. L. Rep. 120; Gerberling v. Wunnenberg, 51 Iowa, 125, 49 N. W. Rep. 861; State v. Kansas City, St. J. & C. B. R. Co., 45 Iowa, 139; Manderschild v. Dubuque, 29 Iowa, 73, 4 Am. Rep. 196; Wilson v. Sexon, 27 Iowa, 15; Onstott v. Murray, 22 Iowa, 457; Commonwealth v. Holiston, 107 Mass. 232; Kennedy v. Le Van, 23 Minn. 513; State v. Eisele, 37 Minn. 256, 33 N. W. 785; Moore v. Hawk, 57 Mo. App. 495; Speir v. New Utrecht, 121 N. Y. 420, 24 N. E. Rep. 692; People v. Loehfelm, 102 N. Y. 1

5 N. E. Rep. 783; State v. Fisher, 117 N. C. 733, 23 S. E. Rep. 158; Commonwealth v. Railroad Co., 135 Pa. St. 256, 19 Atl. Rep. 1051; DuBois Cemetery Co. v. Griffin, 165 Pa. St. 81, 30 Atl. Rep. 840; Richardson v. Dallas (Tex.), 16 S. W. Rep. 622; Michel v. State, 12 Tex. App. 108; McWhorter v. State, 43 Tex. 666; Folsom v. Underhill, 36 Vt. 580.

³ Philadelphia v. Thomas, 152 Pa. St. 494, 25 Atl. Rep. 873.

⁴ Devoe v. Smeltzer, 86 Iowa, 385, 53 N. W. Rep. 287.

⁵ Mahler v. Brumder, 92 Wis. 477, 66 N. W. Rep. 502; Denver v. Denver & Sante Fe R. Co., 17 Colo. 583, 31 Pac. Rep. 338, 41 Am. & Eng. Corp. Cas. 147; Holdane v. Cold Spring, 21 N. Y. 474; Bridges v. Wyckoff, 67 N. Y. 130; Lee v. Sandy Hill, 40 N. Y. 442; Cohoes v. Delaware & H. C. Co., 134 N. Y. 397, 31 N. E. Rep. 887; Mark v. West Troy, 76 Hun, 162, 27 N. Y. S. 543, 57 N. Y. St. 323; Price v. Breckenridge,

acceptance is in time if made at any time before the offer to dedicate is revoked;¹ though the authorities generally hold that the act of acceptance must be within a reasonable time.²

If, before a proffered dedication is accepted, the owner dies, the dedication is revoked.³

455. When the two facts concur, a dedication by the landowner and an acceptance on the part of the public, the dedication is complete;⁴ and cannot be revoked so long as the public use continues, and public rights might be affected by an interruption of the use.⁵

The laying out of land by the owner into streets, avenues or public squares, and the sale of lots thereon, is regarded as a dedication of such streets, avenues and squares to public use, so far as the owner is concerned, who is by such act estopped from setting up any title to the same as against the rights so dedicated to the public, after their acceptance by the public. It is immaterial as

92 Mo. 378, 5 S. W. Rep. 20; Wetmore v. McDougall, 32 Mich. 276; Diamond Match Co. v. Ontonagon, 72 Mich. 249, 40 N. W. Rep. 448; State v. Fisher, 117 N. C. 733, 23 S. E. Rep. 158; Chicago v. Drexel, 141 Ill. 89, 30 N. E. Rep. 774; O'Connell v. Bowman, 45 Ill. App. 654; John Mouat Lumber Co. v. Denver (Colo.), 40 Pac. Rep. 237; Lee v. Mound Station, 118 Ill. 304, 8 N. E. Rep. 759; Littler v. Lincoln, 106 Ill. 353; People v. Reed, 81 Cal. 70, 22 Pac. Rep. 474; Eureka v. Croghan, 81 Cal. 524, 22 Pac. Rep. 693; Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. Rep. 961; Trine v. Pueblo, 21 Colo. 102, 39 Pac. Rep. 330; People v. Dreher, 101 Cal. 271, 35 Pac. Rep. 867; San Francisco v. Canavan, 42 Cal. 541; Eureka v. Croghan, 81 Cal. 524, 22 Pac. Rep. 693, 27 Am. & Eng. Corp. Cas. 17.

¹ Price v. Breckenridge, 92 Mo. 378, 5 S. W. Rep. 20; Rosenberger v. Miller, 61 Mo. App. 422; Griffiths v. Galindo, 86 Cal. 192, 24 Pac. Rep. 1025.

² People v. Reed, 81 Cal. 70, 22 Pac. Rep. 474; Grandville v. Jenison, 84 Mich. 54, 47 N. W. Rep. 600, aff'd 49 N. W. Rep. 544; Cass County v.

Banks, 44 Mich. 467, 7 N. W. Rep. 49; Field v. Manchester, 32 Mich. 279, Wayne County v. Miller, 31 Mich. 447; Galveston v. Williams, 69 Tex. 449, 6 S. W. Rep. 860; Briel v. Natchez, 48 Miss. 423, Crocket v. Boston, 5 Cush. 182, Simmons v. Cornell, 1 R. I. 519; Hardy v. Memphis, 10 Heisk. 127.

³ People v. Kellogg, 67 Hun, 546, 51 N. Y. St. 99, 22 N. Y. Supp. 490; Bridges v. Wyckoff, 67 N. Y. 130. See, also, Wallace v. Townsend, 43 Ohio St. 537, 3 N. E. Rep. 601.

⁴ Coburn v. San Mateo County, 75 Fed. Rep. 520; Union Co. v. Peckham, 16 R. I. 64, 12 Atl. Rep. 130; People v. Marin County, 103 Cal. 223, 37 Pac. Rep. 203; Fairfield v. Morey, 44 Vt. 239, 243; Field v. Manchester, 32 Mich. 279.

⁵ Union Co. v. Peckham, 16 R. I. 64, 12 Atl. Rep. 130; Llano County v. Knowles (Tex. Civ. App.), 29 S. W. Rep. 549; Beall v. Clore, 6 Bush, 680; Harper v. State (Ala.), 21 So. Rep. 354; Ruddiman v. Taylor, 95 Mich. 547, 55 N. W. Rep. 376; Plumb v. Grand Rapids, 81 Mich. 381, 45 N. W. Rep. 1024; Wilder v. St. Paul, 12 Minn. 192, 200.

regards such estoppel whether the owner is a private individual, a State, the United States, or a municipal corporation.¹

A mortgage made after a dedication and acceptance of a highway or park would generally be subject to the public interests therein, for the mortgagee would be affected with notice from a public use so constant and so long continued as to show an acceptance. In such case a court of equity might set aside the mortgage and prevent a foreclosure which might result in a perversion of the land to private uses.²

456. What is a reasonable time within which a dedication may be accepted depends very much upon the circumstances of the case.³ It is for the proper local authorities to determine when the public interests demand that a street shall be graded and fitted for public use, and it has been held that a dedication may be accepted in this way after a lapse of more than thirty years.⁴

Where a landowner offered to dedicate a strip of land along a street to widen it, but the city improved the original street and used it as a public street for more than thirty years, without claiming such additional strip, which was, in the meantime, occupied by the abutting owners, it was held that the city had not accepted such additional strip as part of the street, and was estopped from claiming it.⁵

Where there was a failure of the public for twenty years to accept an offer of dedication, and the owner of the land occupied it for fourteen years more in such a way as to indicate a denial of any right of the public in the street, it was held that the public was estopped from asserting such a right.⁶

¹ *Grogan v. Hayward*, 4 Fed. Rep. 161; *Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Great Northern R. Co. v. St. Paul*, 61 Minn. 1, 63 N. W. Rep. 96; *Borer v. Lange*, 44 Minn. 281, 46 N. W. Rep. 358; *Hurley v. Boom Co.*, 34 Minn. 143, 24 N. W. Rep. 917; *Gilbert v. Emerson*, 60 Minn. 62, 61 N. W. Rep. 820; *Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1, 29 N. E. Rep. 484; *Lake View v. LeBahn*, 120 Ill. 92, 9 N. E. Rep. 269; *Evans v. Blankenship* (Ariz.), 39 Pac. Rep. 812; *Meier v. Railroad Co.*, 16 Oreg. 500, 19 Pac. 610.

² *Maywood Co. v. Maywood*, 118 Ill. 61, 6 N. E. Rep. 866.

³ *Derby v. Alling*, 40 Conn. 410; *Baker v. Johnston*, 21 Mich. 319; *Crocket v. Boston*, 5 Cush. 182; *Bartlett v. Bangor*, 67 Me. 460; *Cook v. Harris*, 61 N. Y. 448.

⁴ *Shea v. Ottumwa*, 67 Iowa, 39, 24 N. W. Rep. 582.

⁵ *Bell v. Burlington*, 68 Iowa, 296, 27 N. W. Rep. 245; *Johnson v. Burlington* (Iowa), 63 N. W. Rep. 694.

⁶ *Grandville v. Jenison*, 84 Mich. 54, 47 N. W. Rep. 600, aff'd 49 N. W. Rep. 544. And see *Field v. Manchester*, 32 Mich. 279.

Where there was a lapse of twenty-three years before accepting an offer of dedication, during which time grantees of the person offering the dedication had erected fences and occupied the land designated as a street, it was held that the offer of dedication was not still open, but that the easement had been lost.¹

IV. *Public Rights of Way by Prescription.*

457. Rights of way may be acquired by the public by prescription, although prescription implies a grant, and in the case of the public there can be no grantee.² By common usage, sanctioned by nearly all the courts, prescription has been applied in the case of highways very much in the same manner that it is applied in the case of private ways. The presumption of a grant is merely a fiction of law, which is not universally adopted as applied to private rights; and where prescription is applied to public ways it may well be said that here is an exception to the rule or theory that the right is founded upon a grant. It is at any rate a rule having general support that a highway may be established by prescription.³

¹ *Vermont Village v. Miller*, 161 Ill. 210, 43 N. E. Rep. 975; *Peoria v. Johnston*, 56 Ill. 45.

² *Hill v. Lord*, 48 Me. 83; *Curtis v. Keesler*, 14 Barb. 511; *State v. K. C.*, St. J. & C. B. R. Co., 45 Iowa, 139.

³ **Arkansas**: *Howard v. State*, 47 Ark. 431, 2 S. W. Rep. 331; *Waring v. Little Rock*, 62 Ark. 408, 36 S. W. Rep. 24.

California: *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. Rep. 448. The Code, Pol. Code, § 2621, provides that no route of travel used by one or more persons over another's land shall hereafter become a public road or by-way by use, until so declared by the board of supervisors or by dedication by the owner of the land affected.

Idaho: *Gross v. McNutt* (Idaho), 38 Pac. Rep. 935.

Illinois: *Wheatfield v. Grundmann*, 164 Ill. 250, 252, 45 N. E. Rep. 164; *Chicago v. Chicago*, R. I. & P. R. Co., 152 Ill. 561, 38 N. E. Rep. 768; *Toof v. Decatur*, 19 Ill. App. 204; *Owens v. Crossett*, 105 Ill. 354; *Madison v. Gal-*

lagher, 159 Ill. 105, 42 N. E. Rep. 316; *Daniels v. People*, 21 Ill. 439; *Landers v. Whitefield*, 154 Ill. 630, 39 N. E. Rep. 656; *Lewiston v. Proctor*, 27 Ill. 414.

Indiana: *Shirk v. Carroll County Com'rs*, 106 Ind. 573, 5 N. E. Rep. 705, 7 N. E. Rep. 251; *Ross v. Thompson*, 78 Ind. 90; *Brown v. Hines* (Ind. App.), 44 N. E. Rep. 655; *Louisville, N. A. & C. R. Co. v. Etzler*, 3 Ind. App. 362, 30 N. E. Rep. 32; *Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. Rep. 743; *Marion v. Skillman*, 127 Ind. 130, 26 N. E. Rep. 676, 11 L. R. A. 55.

Iowa: *Onstott v. Murray*, 22 Iowa, 457; *McAllister v. Pickup*, 84 Iowa, 65, 50 N. W. Rep. 556; *Mosier v. Vincent*, 34 Iowa, 478; *State v. Tucker*, 36 Iowa, 485; *State v. Green*, 41 Iowa, 693; *State v. Welpton*, 34 Iowa, 144; *State v. Mitchell*, 58 Iowa, 567, 12 N. W. Rep. 598.

Kansas: *State v. O'Laughlin*, 29 Kan. 20; *Topeka v. Cowee*, 48 Kan. 345, 29 Pac. Rep. 560.

Kentucky: *Beall v. Clore*, 6 Bush, 676.

458. A highway by prescription may be established by evidence of use by the public, adverse and continuous, for twenty years or more, or for such lesser period as has been established by the local

Maine: *State v. Bunker*, 59 Me. 366; *Blanchard v. Moulton*, 63 Me. 434.

Maryland: *Day v. Allender*, 22 Md. 511.

Massachusetts: *Sprow v. Boston & A. R. Co.*, 163 Mass. 330; *Commonwealth v. Coupe*, 128 Mass. 63; *Gordon v. Taunton*, 126 Mass. 349; *Weld v. Brooks*, 152 Mass. 297, 25 N. E. Rep. 719; *Fitchburg R. Co. v. Page*, 131 Mass. 391; *Gould v. Boston*, 120 Mass. 300; *McKenna v. Boston*, 131 Mass. 143; *Woburn v. Henshaw*, 101 Mass. 193; *Holt v. Sargent*, 15 Gray, 97; *Jennings v. Tisbury*, 5 Gray, 73; *Folger v. Worth*, 19 Pick. 108; *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 602; *Commonwealth v. Low*, 3 Pick. 408; *Odiorne v. Wade*, 5 Pick. 421; *Commonwealth v. Newbury*, 2 Pick. 51; *Commonwealth v. Belding*, 13 Met. 10; *Ballard v. Demmon*, 156 Mass. 449, 31 N. E. Rep. 635.

Michigan: *Campau v. Detroit*, 104 Mich. 560, 62 N. W. Rep. 718; *Bumpus v. Miller*, 4 Mich. 158; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Nye v. Clark*, 55 Mich. 599, 22 N. W. Rep. 57; *Coleman v. Railroad Co.*, 64 Mich. 160, 31 N. W. Rep. 47; *Kruger v. Le Blanc*, 70 Mich. 76, 37 N. W. Rep. 880; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. Rep. 270.

Missouri: *State v. Proctor*, 90 Mo. 334, 2 S. W. Rep. 472; *State v. Wells*, 70 Mo. 635; *State v. Walters*, 69 Mo. 463; *State v. Bradley*, 31 Mo. App. 308; *McLemore v. McNeley*, 56 Mo. App. 556; *State v. Keeland*, 90 Mo. 337, 2 S. W. Rep. 442; *Zimmerman v. Snowden*, 88 Mo. 218; *Price v. Breckenridge*, 92 Mo. 378, 5 S. W. Rep. 20; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. Rep. 207.

Nebraska: *Beatrice v. Black*, 28 Neb. 263, 44 N. W. Rep. 189; *Nelson v. Jenkins*, 42 Neb. 133, 60 N. W. Rep. 311.

New Hampshire: *Stevens v. Nashua*, 46 N. H. 192; *Campton's Petition*, 41 N. H. 197; *Wallace v. Fletcher*, 30 N. H. 434.

New Jersey: *Smith v. State*, 23 N. J. L. 130.

New York: *Cohoes v. Del. & H. Canal Co.*, 134 N. Y. 397, 31 N. E. Rep. 887; *Devenpeck v. Lambert*, 44 Barb. 596; *Wiggins v. Tallmadge*, 11 Barb. 457; *Corning v. Head*, 86 Hun, 12, 67 N. Y. St. 110, 33 N. Y. Supp. 360; *Hariman v. Howe*, 78 Hun, 280, 60 N. Y. St. 225, 28 N. Y. Supp. 858.

North Carolina: *State v. Hunter*, 5 Ired. 369.

Ohio: *Duffy v. Norwood*, 1 Ohio Dec. 85.

Oregon: *Grady v. Dundon (Oreg.)*, 47 Pac. Rep. 915.

Pennsylvania: *Boyle v. Hazleton*, 8 Kulp, 239; *Commonwealth v. Railroad Co.*, 135 Pa. St. 256, 19 Atl. Rep. 1051; *Wilkes-Barre's App.*, 100 Pa. St. 313; *Weiss v. South Bethlehem*, 136 Pa. St. 294, 20 Atl. Rep. 801, 32 Am. & Eng. Corp. Cas. 64; *Commonwealth v. Cole*, 26 Pa. St. 187; *Bush v. Johnston*, 23 Pa. St. 209; *Garrett v. Jackson*, 20 Pa. St. 331.

Rhode Island: *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. Rep. 331.

Tennessee: *Wilson v. Acree (Tenn.)*, 37 S. W. Rep. 90; *Worth v. Dawson*, 1 Sneed, 59; *Sharp v. Mynatt*, 1 Lea, 375.

Vermont: *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207; *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560.

West Virginia: *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. Rep. 1020.

Wisconsin: *Mahler v. Brumder*, 92

statute of limitations; from which use arises a presumption of a reservation or grant, and an acceptance thereof, or that it had been laid out by the proper authorities, of which no record exists.¹ "To establish such a way, where there is no proof of dedication, and where the element of dedication does not subsist, it will be necessary to prove actual public use, general, uninterrupted, continued for a certain length of time. In general, it must be such as to warrant a presumption of laying out, dedication or appropriation, by parties having authority so to lay out, or a right so to appropriate, like that of prescription or non-appearing grant in case of individuals. It stands upon the same legal grounds, a presumption that whatever was necessary to give the act legal effect and operation was rightly done, though no other evidence of it can be produced except the actual enjoyment of the benefits conferred by it."²

459. User of land for the statutory period as a public highway conclusively establishes a dedication of the land for that purpose. "The effect of user as a highway by the public is not dependent upon extrinsic evidence which might tend to show that, while the user implied a dedication, in fact none was made."³ The question in such case is whether the way has been used by the public as a highway for the statutory period.⁴ "Where it is sought to show

Wis. 477, 66 N.W. Rep. 502; Buchanan v. Curtis, 25 Wis. 99, 3 Am. Rep. 23; Hanson v. Taylor, 23 Wis. 547; Lemon v. Hayden, 13 Wis. 159; Wyman v. State, 13 Wis. 663; Bartlett v. Beardmore, 77 Wis. 356, 46 N. W. Rep. 494.

¹ Fitchburg R. Co. v. Page, 131 Mass. 391, 395, per Endicott, J.

² Jennings v. Tisbury, 5 Gray, 73, 74, per Shaw, C. J. And see Howard v. State, 47 Ark. 431, 2 S. W. Rep. 331; Wheatfield v. Grundmann, 164 Ill. 250, 252, 45 N. E. Rep. 164; Commonwealth v. Cole, 26 Pa. St. 187; Root v. Commonwealth, 98 Pa. St. 170; State v. Mitchell, 58 Iowa, 567; State v. Green, 41 Iowa, 693; Devenpeck v. Lambert, 44 Barb. 596; Brownell v. Palmer, 22 Conn. 107.

³ Campau v. Detroit, 104 Mich. 560, 62 N. E. Rep. 718, per Hooker, J. In

Ellsworth v. Grand Rapids, 27 Mich. 250, 256, it is said that "to require under this statute proof of an intention to dedicate, as a necessary element to establish a road by user, would be not only to import into the statute an element of which no intimation is found there, but completely to nullify the statute itself, and to defeat its manifest purpose, which was, so far as its prospective provisions are concerned, to bar the right of the owner to dispute the rightfulness of the public user after the prescribed period in all cases where the user for that period has been uninterrupted and undisturbed, whatever the actual intention of the owner might be."

⁴ Madison v. Gallagher, 159 Ill. 105, 42 N. E. Rep. 316; Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. Rep. 448; Devenpeck v. Lambert, 44 Barb. 596.

that a road is a public highway," say the Supreme Court of Illinois,¹ "by proving that it has been known and used as a highway common to all the people for the statutory period of prescription, it is unnecessary to show the original intention of the owners of the soil.² Such intention is only material where the object is to establish a public highway by dedication."³

To establish a public road by prescription, it is not necessary to show, in addition to user for the prescribed number of years, that the proper authorities have worked the road, or repaired it, or attached it to some road district, or done some act recognizing it as a highway. In this respect it is deemed to be immaterial whether the prescriptive right is at common law, or under a statute such as exists in Illinois, Indiana, Michigan, Wisconsin, and other States, declaring that the use of a road as a highway by the public makes it a public highway. Acts of recognition by the public authorities might be more conclusive evidence of the use of the road as a highway. But a prescriptive right at common law may be shown without such recognition. "Where the public pass more or less frequently for the statutory period over a highway as often as they have occasion to pass in that direction, and where the amount of travel, considered with reference to the surrounding circumstances, shows that the public exercise the right of using the land as and for a highway, such user authorizes the presumption of a grant, or the presumption that the road was laid out by competent authority."⁴

460. A legal disability on the part of the owner of the land operates to defeat a prescriptive right to a highway, according to the decisions, provided the disability existed at the beginning of the prescriptive period, and did not intervene after that period had commenced to run.⁵ This is the rule applicable in the case of private ways;⁶ and it rests upon the ground that persons under legal disability are incapable of making a grant, and prescription presupposes a grant. If a presumption of a grant is not necessary

¹ *Madison v. Gallagher*, 159 Ill. 105, 111, 42 N. E. Rep. 316.

² *Strong v. Makeever*, 102 Ind. 578, 1 N. E. Rep. 502, 4 N. E. Rep. 11.

³ *Kyle v. Logan*, 87 Ill. 64; *Kelly v. Chicago*, 48 Ill. 388; *Gentleman v. Soule*, 32 Ill. 271, 83 Am. Dec. 264.

⁴ *Madison v. Gallagher*, 159 Ill. 105, 111, per Magruder, J. And also Hart

v. Red Cedar, 63 Wis. 634, 24 N. W. Rep. 410.

⁵ *Edson v. Munsell*, 10 Allen, 557; *McGregor v. Wait*, 10 Gray, 72; *Melvin v. Whiting*, 13 Pick. 184; *Watkins v. Peck*, 13 N. H. 360; *State v. Bishop*, 22 Mo. App. 435.

⁶ § 198.

in the case of highways, as it is contended, but these may be established by user without resorting to such a presumption, the doctrine of disability is not applicable.¹

Under a statute declaring that all roads which have been used as public highways for twenty years or some other period shall be deemed public highways, it is held that the intention of the owner is not material, and that user for such period is sufficient to establish such roads public highways, though the owner of the land over which they pass be a lunatic, an infant or married woman, and has no knowledge of such user during the entire period.² Cases arising under such statutes are to be distinguished from cases in which the rights depend upon prescription.

461. To create a public way by use, the proof must show that the use has been general, uninterrupted, continuous and adverse, so as to warrant the inference that it had been laid out, appropriated or dedicated by the proprietors of the adjoining land to the public.³ "To acquire a right of way by prescription, there must be an adverse use of the way for twenty years, and this use must be continuous and as of right. If the use is interrupted by the owner of the land, by obstructions placed upon it in the exercise of his right to prevent the use of the way, the continuity of the use is broken. Whether the interruption is acquiesced in by the claimant of the right of way in such manner that the subsequent use must be regarded as permissive is a question for the jury upon the facts."⁴

A desultory use by the public of land adjacent to a highway, by permission of the owner, but not under a claim of right, for the

¹ Elliott on Roads, 138; Wallace v. Fletcher, 30 N. H. 434; Webber v. Chapman, 42 N. H. 326.

² Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. Rep. 448; Bolger v. Foss, 65 Cal. 250, 3 Pac. Rep. 871; Freshour v. Hihn, 99 Cal. 443; Devenpeck v. Lambert, 44 Barb. 599.

³ Coburn v. San Mateo County, 75 Fed. Rep. 520; Holt v. Sargent, 15 Gray, 97; Jennings v. Tisbury, 5 Gray, 73; Taylor v. Water Power Co., 12 Gray, 415; Bodfish v. Bodfish, 105 Mass. 317; Webster v. Lowell, 142 Mass. 324, 8 N. E. Rep. 54; State v.

Green, 41 Iowa, 693; Chicago v. Chicago, R. I. & P. R. Co., 152 Ill. 561, 38 N. E. Rep. 768; Brushy Mound v. McClintock, 150 Ill. 129, 36 N. E. Rep. 976; Wheatfield v. Grundmann, 164 Ill. 250, 45 N. E. Rep. 164; Madison v. Gallagher, 159 Ill. 105, 42 N. E. Rep. 316; Manrose v. Parker, 90 Ill. 581; Kyle v. Logan, 87 Ill. 64; Gentleman v. Soule, 32 Ill. 271, 279; Jones v. Davis, 35 Wis. 376; Howard v. State, 47 Ark. 431, 2 S. W. Rep. 331; Topeka v. Cowee, 48 Kan. 345, 29 Pac. Rep. 560.

⁴ Webster v. Lowell, 142 Mass. 324, 341, per Field, J.

period of twenty years, is insufficient to establish the right of the public to use said land as a public highway as against the owner.¹

462. A highway may be established by prescription, although a statute provides that it shall not be established by dedication, unless it is accepted, laid out and established in the manner prescribed. The statute leaves untouched the case of public ways by prescription.² Since the statute, as well as before, a way may be proved by long and continued use and enjoyment by the public, upon the ground that a conclusive presumption arises from such use that it has been established by competent authority.³

463. In some States to constitute a highway by use the way must have been kept in repair or adopted by the public authorities. A statute declaring that "all roads not recorded which have been or shall have been used as public highways for twenty years or more shall be deemed public highways," requires that the road shall have been kept in repair under the charge of the public authorities. "The user need not be adverse, and under such circumstances as would be required to give an individual a right of way by prescription. If such had been the intention, other language would, we think, have been used. All we have here is that 'the road was used by the public generally.' But the mere fact that a portion of the public travel over a road for twenty years cannot make it a highway; and the burden of making highways and sustaining bridges cannot be imposed upon the public in that way. There must be more. The user must be like that of highways generally. The road must not only be traveled upon, but it must be kept in repair or taken in charge and adopted by the public authorities. * * * Here there is no proof of the circumstances under which the public traveled upon this road, and it does not appear that the public authorities kept it in repair or adopted it, or in any way recognized it as a highway. A private way opened by the owners of the land through which it passes for their own uses does not

¹ White v. Wiley, 59 Hun, 618, 13 N. Y. Supp. 205.

² Commonwealth v. Coupe, 128 Mass. 63; Jennings v. Tisbury, 5 Gray, 73; Hayden v. Attleboro, 7 Gray, 338; Commonwealth v. Holliston, 107 Mass. 232; Richards v. County Commissioners, 120 Mass. 401; Commonwealth v. Mat-

thews, 122 Mass. 60; McKenna v. Boston, 131 Mass. 143. A *dictum* to the contrary in Commonwealth v. Taunton, 16 Gray, 228, is not law. Waring v. Little Rock, 62 Ark. 408, 36 S. W. Rep. 24; Patton v. State, 50 Ark. 53, 6 S. W. Rep. 227.

³ Veale v. Boston, 135 Mass. 187.

become a public highway merely because the public are also permitted for many years to travel over it.”¹

464. The width and boundaries of a highway, when these are left uncertain by the act of dedication, are established by twenty years’ user by the public.² But in the case of ancient highways, the right of the public is not limited to that portion of the highway usually called the traveled path. “Where a tract three or four rods wide, such as is usually laid out as a highway, has been used as such, although twenty or thirty feet only have been used as a traveled path, still this is such a use of the whole as constitutes evidence of the right of the public to use it as a highway, by widening the traveled path, or otherwise, as the increased travel and the exigencies of the public may require.” The use is presumed to be co-extensive with the location.³

A dedication of a highway is presumed to be a dedication of a highway of the width fixed by statute.⁴ In the absence of such a statute, the width of the highway is fixed by the dedication and acceptance by the public; and the acceptance may be shown by public use.⁵ Where the prescriptive use arose under defective proceedings instituted for laying out a highway, the extent of the easement may be measured by the extent of the way intended to be established by such proceedings.⁶

465. A highway by prescription can be created only by public travel over a definite route, and not by travel by varying routes,

¹ *Spir v. New Utrecht*, 121 N. Y. 420, 429, 24 N. E. Rep. 692, per Earl, J., followed and approved in *Lewis v. New York, L. E. & W. R. Co.*, 123 N. Y. 496, 503, 26 N. E. Rep. 357; *Harriman v. Howe*, 78 Hun, 280; *People v. Osborn*, 84 Hun, 441, 32 N. Y. Supp. 358, 65 N. Y. St. 556; *People v. Underhill*, 144 N. Y. 316, 39 N. E. Rep. 333; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. Rep. 1020; *Yates v. Grafton*, 33 W. Va. 507, 11 S. E. Rep. 8; *Ball v. Cox*, 29 W. Va. 407, 1 S. E. Rep. 673.

² *Western R. Co. v. Alabama Grand Trunk R. Co.*, 96 Ala. 272, 17 L. R. A. 474; *Hinks v. Hinks*, 46 Me. 423; *Holbrook v. McBride*, 4 Gray, 215; *Dodge v. Stacy*, 39 Vt. 558, 576; *Morse v.*

Ranno, 32 Vt. 600; *Trask v. State*, 6 Vt. 355, 27 Am. Dec. 554; *Sherman v. Hastings*, 81 Iowa, 372, 46 N. W. Rep. 1084; *Davis v. Clinton*, 58 Iowa, 389, 10 N. W. Rep. 768.

³ *Pillsbury v. Brown*, 82 Me. 450, 19 Atl. Rep. 858; *Bowers v. Barrett*, 85 Me. 382, 27 Atl. Rep. 260, 43 Am. & Eng. Corp. Cas. 191.

⁴ *People v. Marin County*, 103 Cal. 223, 37 Pac. Rep. 203; *Humboldt County v. Dinsmore*, 75 Cal. 604, 17 Pac. Rep. 710.

⁵ *Dickerson v. Detroit*, 99 Mich. 498, 58 N. W. Rep. 645.

⁶ *Manrose v. Parker*, 90 Ill. 581; *Waltman v. Rund*, 109 Ind. 366, 10 N. E. Rep. 117.

though in the same general direction.¹ But it is not indispensable that there be no deviation in the line of travel. If the travel has remained substantially unchanged, it is sufficient; even though at times, to avoid encroachments or obstructions upon the road, there may have been a slight deviation from the common way.²

466. A public way may be established chiefly upon proof of the use of the way by the public at certain periods of the year, continued regularly for the same purpose year after year for many years. Thus, Lord Selborne, in a Scottish case before the House of Lords, said: "Although, except at certain periods and for certain purposes, the use of it may be so casual, that if that had stood alone it might have been insufficient to make out the right, yet the very periodicity and the nature of the purposes which at those periods caused the use of it to take place, give emphasis to all the other circumstances as calculated to call the attention of the proprietors and occupiers to the matter, and to lead either to interference or to definite permission, if the thing were not of right."³

467. An interruption of the use of a way, which will break the continuity of the public enjoyment of it, must be the act of the owner of the land across which the right of way is exercised.⁴ "An obstruction which will have the effect of destroying the prescriptive right is not an obstruction that is placed in the highway by a trespasser or outside party, but one that is placed there by the owner of the land; and it must be of such a kind as to evince an intention on the part of the owner to exclude the public from the use of the highway."⁵ A slight, or occasional, or temporary obstruction of the way by the owner does not constitute an interruption of the public use. If the public acquiesce in the obstruction in such a

¹ Friel v. People, 4 Colo. App. 259, 35 Pac. Rep. 676; Starr v. People, 17 Colo. 458 30 Pac. Rep. 64; Ottawa v. Yentzer, 160 Ill. 509, 43 N. E. Rep. 601; Owens v. Crossett, 105 Ill. 354; Gentleman v. Soule, 32 Ill. 271, 83 Am. Dec. 264; Bryan v. East St. Louis, 12 Ill. App. 390; South Branch R. Co. v. Parker, 41 N. J. Eq. 489, 5 Atl. Rep. 641; Vossen v. Dautel, 116 Mo. 379, 22 S. W. Rep. 734; Shaffer v. Stull, 32 Neb. 94, 48 N. W. Rep. 882.

² Nelson v. Jenkins, 42 Neb. 133;

Beatrice v. Black, 28 Neb. 263, 44 N. W. Rep. 189; Howard v. State, 47 Ark. 431, 2 S. W. Rep. 331; State v. McGee, 40 Iowa, 595.

³ Macpherson v. Scottish Rights of Way, etc., Soc., 15 Ro. H. L. (Session Cas. 4th Series), 68, 70.

⁴ Webster v. Lowell, 142 Mass. 324, 8 N. E. Rep. 54; Shellhouse v. State, 110 Ind. 509, 11 N. E. Rep. 484; O'Connell v. Bowman, 45 Ill. App. 654.

⁵ Madison v. Gallagher, 159 Ill. 105, 112, 42 N. E. Rep. 316.

manner as to make the subsequent public use permissive, there is an interruption which destroys the effect of the previous user. But whether the obstruction is acquiesced in, is a question for the jury upon the facts.¹

Mere intermission of use is not an interruption.²

An interruption to effect the previous user must be an interruption of the right and not merely an interruption of the use or possession.³

468. A town may acquire a private right of way by prescription as appurtenant to a burial ground owned by the town. "Such a way, although open to use for all persons who have a right to go to and from the burial ground, is not necessarily a public way. It may not be a way for all travelers, but only for those who have rights in the burial ground. Suppose such a way were closed by a gate at the place where it meets a highway, and this gate were kept locked, and only opened by some person in charge of the burial ground for the purpose of admitting persons to it, this would be strong evidence that it was a private way."⁴

469. The placing of a gate or fence across a private way prevents an acquisition of an easement in it by the public, because it shows that the owner exercises control over the way, and if the public use the way the use is not adverse to the owner. "It seems that any act on the part of the owner, reserving to himself a right or use, which is or may be inconsistent with, or antagonistic to, the free use on the part of the public as a highway, has the effect of destroying the right of the public by prescription."⁵

470. The public cannot acquire a right of way by use for the prescriptive period, if the use is by license or permission of the owner.⁶ The fact that a landowner has for many years permitted his neighbors and summer visitors to pass through his gate, and over his land

¹ Webster v. Lowell, 142 Mass. 324, 341, 8 N. E. Rep. 54.

² Madison v. Gallagher, 159 Ill. 105, 113, 42 N. E. Rep. 316.

³ Shellhouse v. State, 110 Ind. 509, 11 N. E. Rep. 484; Jones v. Davis, 35 Wis. 376; Toof v. Decatur, 19 Ill. App. 204.

⁴ Deerfield v. Connecticut River R. Co., 144 Mass. 325, 335, 11 N. E. Rep. 105, per Field, J.

⁵ Jones v. Phillips, 59 Ark. 35, 26 S. W. Rep. 386, 388, per Bunn, C. J. And see Shellhouse v. State, 110 Ind. 509, 11 N. E. Rep. 484; State v. Green, 21 Iowa, 693; State v. Mitchell, 58 Iowa, 567, 12 N. W. Rep. 598; Chestnut Hill Turnpike Co. v. Piper, 77 Pa. St. 432; Cyr v. Madore, 73 Me. 53.

⁶ Irwin v. Dixon, 9 How. 10; Brushy Mound v. McClintock, 150 Ill. 129, 36 N. E. Rep. 976; Kyle v. Logan, 87 Ill.

to a beach on the seashore does not of itself constitute such user as can ripen by lapse of time into a prescriptive right at common law on the part of the public to use the road.¹

471. A prescriptive right of the public to use a private railroad crossing upon a farm cannot be acquired so long as the use is permissive, and the fact that gates and bars had been kept on one side of the railroad tracks is a material circumstance showing that the use by the public was permissive. “It was a case of persons going through bars or a gate, with no highway worked upon one side of the track, the land there being farm land, open country, merely level land; with no evidence of any repairs on either side of the railroad at the public expense, or any public action whatever in respect to the crossing or the approaches thereto; with no assertion of right on the part of anybody to cross either the railroad or the land of the private owners on the sides thereof. There was nothing to show any great amount of crossing by others than those entitled to use the private crossing, or that such crossing was acquiesced in by the railroad company as a matter of right. There being a crossing properly open to some persons, an occasional crossing by others, if known to the railroad company, is more consistent with permission or toleration than with the supposition that it was done and acquiesced in as a matter of right.”²

472. A public easement of a passage-way cannot be acquired by the use for any length of time of a path by the side of a railroad track within its right of way which is in daily and constant use by the railroad company for the operation of its road, and the company is entitled to an injunction to restrain any interference with its laying of a second track which covers the paths previously used by

64; *Root v. Commonwealth*, 98 Pa. St. 170, 42 Am. Rep. 614; *Tucker v. Conrad*, 103 Ind. 349; *Blanchard v. Moulton*, 63 Me. 434; *Vossen v. Dautel*, 116 Mo. 379, 22 S. W. Rep. 734; *Lanier v. Booth*, 50 Miss. 410; *Harriman v. Howe*, 78 Hun, 280, 60 N. Y. St. 225, 28 N. Y. Supp. 858; *Speir v. New Utrecht*, 121 N. Y. 420, 24 N. E. Rep. 692; *Lewis v. New York, L. E. & W. R. Co.*, 123 N. Y. 496, 26 N. E. Rep. 357; *People v. Livingston*, 27 Hun, 105; *Gowen v. Phila. Exch. Co.*, 5

W. & S. 141; *Stewart v. Frink*, 94 N. C. 487, 55 Am. Rep. 619; *Pentland v. Keep*, 41 Wis. 490; *Smith v. State* (Tex. Crim. App.), 40 S. W. Rep. 736; *Cunningham v. San Saba Co.* (Tex. Civ. App.), 20 S. W. Rep. 941; *State v. Kent County* (Md.), 35 Atl. Rep. 62.

¹ *Coburn v. San Mateo County*, 75 Fed. Rep. 520.

² *McCreary v. Boston & M. R. Co.*, 153 Mass. 300, 307, 11 L. R. A. 359, 360, 26 N. E. Rep. 864, per Allen, J.

the public. "The rule does not differ because the location of a road is through a populous district, in this case through a borough, whose citizens have availed themselves of the convenience of using the ground along the railroad track, notwithstanding the railroad ties and rails of the company may not have spanned and bound literally, with an iron grasp, from one side to the other, its authorized domain."¹

Where a strip of land sixty feet wide was occupied by the tracks of a steam locomotive railroad twenty feet in width and the railroad bed was of such a character as to be unsuitable for ordinary highway purposes, the way cannot be deemed to be a public way by prescription, for such occupation of it is inconsistent with the acquirement by adverse possession of a right of public easement.²

The mere permissive use by the public, without claim of right, of a passway over and along a railroad right of way, started by being used by the railroad company in the construction of its road, gives the public no right therein.³

But a public footway across a railroad track may be acquired by prescription like other public ways.⁴

473. The use by the public of a private way to a wharf is regarded as permissive and not inconsistent with private ownership. The very nature of the property indicates that access to the wharf over the way must be kept open for the convenience of the owner and his customers. The public use of such way is permitted by the owner for his own profit.⁵ In such a case the court said: "This roadway or street has been used by the public and plaintiffs as a means of conducting and carrying on the business appertaining

¹ *Pennsylvania R. Co. v. Freeport*, 138 Pa. St. 91, 96, 20 Atl. Rep. 940, per Neale, P. J., whose opinion is affirmed by the Supreme Court.

² *Speir v. New Utrecht*, 121 N. Y. 420, 24 N. E. Rep. 692, 49 Hun, 294, 2 N. Y. Supp. 426. See, however, *Hansen v. Southern Pac. R. Co.*, 105 Cal. 379, 38 Pac. Rep. 957, where it was held that there is a presumption of acquiescence by a railroad company in the use by the public of its right of way as a foot path after twenty years of such user with the knowledge of the company.

³ *Thornton v. Louisville & N. R. Co.* (Ky.), 39 S. W. Rep. 694, citing *Conyers v. Scott* (Ky.), 21 S. W. Rep. 530; *Bowman v. Wickliffe*, 15 B. Mon. 84, and *Hall v. McLeod*, 2 Metc. (Ky.), 98.

⁴ *Fitchburg R. Co. v. Page*, 131 Mass. 391; *McCreary v. Boston & M. R. Co.*, 153 Mass. 300, 11 L. R. A. 359, 26 N. E. Rep. 864.

⁵ *Irwin v. Dixon*, 9 How. 10; *Lewis v. Portland*, 25 Oreg. 133, 156, 35 Pac. 256, 22 L. R. A. 736; per Lord, C. J. *Buffalo v. Delaware, L. & W. R. Co.*, 39 N. Y. Supp. 4.

to this wharf and warehouse, and the facts indicate that it has not been used for any other purpose. The plaintiffs have at all times maintained their right to the *locus in quo*, consistent with its use as a passage or roadway to and from their wharf, and the use of it by the public for such purpose was not under a claim of right, but by their permission. The city authorities have not exercised any acts of ownership over or assumed any right to control it; nor has the city made any improvements or performed any work upon the same by way of repairs or otherwise, but the evidence shows that the plaintiffs have used and occupied such property to the exclusion of the public, except so far as was necessary for the public to use it in doing business at their wharf. The evidence also shows that the plaintiffs have asserted their ownership of the land in controversy by acts and declarations which are entirely inconsistent with any intention to abandon or dedicate it to the public use. They have used it for the storage of iron, brick, and other heavy freight; they have improved and repaired it; they have kept a gate across it for ten or twelve years; exercised the right to exclude persons or teams from it whenever they chose to do so; they have publicly and repeatedly, in connection with the use of the property, declared that it was not a public street, but a private way to their wharf and warehouse.”

474. Whether the public use of a way has been by leave or license or tolerance or sufferance is a question of fact. In an action to establish a public right of way for passengers on foot and on horseback, and for driving cattle and sheep through the Glen of the Doll in Forfarshire, Scotland, it was proved that the pass formed the direct and natural access from Clova to Braemare, and that from time immemorial there had existed a well-known and well-defined track through the glen; that it had been the practice of drovers to take sheep by this track from the public market at Braemare in spring and autumn to another public market; that the track had been used by farmers in the district, and occasionally by tourists; that there had been a repute in the district, both among the public and among the landowners, that there was a public right of way. It was held upon the evidence that the way was not to be attributed to tolerance but to the assertion of a public right. In the House of Lords, the Lord Chancellor, Halsbury, said: “Now, I ask myself this question, whether, in the first place, I can infer from that state of facts that the proprietor was aware of what

took place? I cannot doubt that, dealing with such public rights and such public matters as the markets, which persons in the neighborhood were in the habit of going to and coming from, it would be almost impossible but that the proprietor would become acquainted with that practice. And the second question immediately follows, whether, if he was aware of the long-continued and well-settled practice which was going on from year to year (not through the whole year, of course, because the occasions did not arise, but on two ordinary and settled occasions in every year), the proprietor would, on the footing of its being a mere license or permission, be likely to stand by and allow the right, which he must know would very probably be established by such constant user, to be established without interference or remonstrance on his part? My Lords, I have come to the conclusion that it would be impossible to sustain that contention. However good natured the proprietor might be, and however desirous of assisting his neighbors, I think he would desire to protect his rights by insisting upon some record of his rights, or some way of showing that what was being done was by his license and permission, and not as of right; but I look in vain throughout the whole of this evidence for the least intimation of any effort on the part of the proprietor to impose upon those persons who were using this road — which was a wild mountain road, and one unfrequented, no doubt, on ordinary occasions — any kind of hindrance which could be removed by his permission.”

475. But although the use of a road begun by permission, if it is continued under a claim of right for a term equal to the period of limitation established by statute, the right is acquired by prescription.²

Where a railroad company constructed for its own use a bridge across a stream, in a city, building under and attaching to the main structure a footway for the public use, the company itself having no use for such a passway, there was a dedication of the footway by the railroad company to the public use; and the city having lighted up the way with gas, and by its officers caused the railroad company to make repairs, and aided in constructing the approaches, there was as complete an acceptance by the city of the dedication as was

¹ Macpherson v. Scottish Rights of Way, etc., Soc., 15 R. H. L. (Session Cas. 4th Series), 68, 69. Lord Sel-

bourne, in the same case, expressed similar views.

² McAllister v. Pickup, 84 Iowa, 65, 50 N. W. Rep. 556.

compatible with the right of the owners. The railroad company having thus maintained the footway for more than thirty years, the city acquired the right to its use by prescription. The company having torn down the old bridge and erected a new one in its stead, leaving off and declining to rebuild the footway, in an action brought by the city for that purpose the chancellor properly required the company to restore the way. While the restoration of such an artificial way cannot be directed where the structure falls from decay or is necessarily removed, yet where the deliberate agency of the owner, unaffected by the conditions mentioned, is the destroying power, the restoration may be required.¹

476. There are cases which hold that the mere use of a way over waste and unenclosed land does not give a prescriptive right, though continued for the total period of limitation.² "As the presumption of a grant of way by the owner of the land arises from the exercise of a privilege adverse to his right of property, and from his acquiescence in the exercise of the privilege, the presumption will not be supported, if the use of the way does not impinge on his rights, nor conflict with his enjoyment of his property. A distinction must, therefore, be observed between the claim of a way through enclosed and cultivated land, and of a way over unenclosed woodland. In the former case, the mere use is an invasion of property, and a trespass; and acquiescence or submission to the exercise of a privilege, under circumstances which make it actionable, may justify the inference of a legal right in the person who exercises the privilege. But when the way passes over woodland, those who travel it commit no trespass (at least not until after notice to desist), and subject the owner to no loss or inconvenience. To prohibit them would be considered churlish; and would be ineffectual, unless a constant watch was kept to prevent them. And to require the owner to secure his land against an adverse claim, by a

¹ Kentucky Central R. Co. v. Paris, 95 Ky. 627.

² § 439; Friel v. People (Colo.), 35 Pac. Rep. 676; Fox v. Virgin, 11 Ill. App. 513; Kyle v. Logan, 87 Ill. 64; Warren v. Jacksonville, 15 Ill. 236; Herhold v. Chicago, 108 Ill. 467; Hutto v. Tindall, 6 Rich. 396; State v. Horn, 35 Kan. 717, 12 Pac. Rep. 148; Hogg v. Gill, 1 McMullan, 329; Sims v.

Davis, Cheves, 1, 34 Am. Dec. 581; Cyr v. Dufour, 68 Me. 492; Gulf, C. & S. F. R. Co. v. Montgomery, 85 Tex. 64, 19 S. W. Rep. 1015; Gilder v. Brenham, 67 Tex. 345, 3 S. W. Rep. 309; Harriman v. Howe, 78 Hun, 280, 60 N. Y. St. 225, 28 N. Y. Supp. 858; Rathman v. Norenberg, 21 Neb. 467, 32 N. W. Rep. 305; Shaffer v. Stull, 32 Neb. 94, 48 N. W. Rep. 882.

use not actionable, of a way over it, would to that extent exclude his property from the protection of the law.”¹

477. The general rule as to acquiring a right of public way by prescription does not apply to an open way in a city which the owner has left for his private use, though the public has also used it without objection. Nor does the rule apply where the owner’s purpose not to dedicate it to the public is manifest from the way itself or from its relation to the owners of the land.²

Upon the issue whether a street has become a public way by prescription an ancient deed of land in which the street is mentioned and a plan referred to in the deed are admissible in evidence, in the discretion of the judge, to show the origin and history of the way.³

Where the public has acquired an easement by user in a highway, the listing of the land for taxes and payment thereof by the owner do not affect the rights of the public in the land.⁴

V. *Extent of the Public Easement.*

478. The public by dedication or use of a highway acquire only an easement in the land and not an interest in the soil itself. The owner of land taken for a highway by grant or use retains his exclusive right in the soil for every purpose of use or profit not inconsistent with the public easement and may maintain trespass or ejectment for any encroachment upon it.⁵ “In other words, the only servitude imposed on the land is the right of the public to

¹ *Hutto v. Tindall*, 6 Rich. 396, 400, per Frost, J. See, also, dissenting opinion by Dixon, C. J., in *Hanson v. Taylor*, 23 Wis. 547, 554, elaborately stating the grounds of it. *State v. K. C., St. J. & C. B. R. Co.*, 45 Iowa, 139.

² *Toof v. Decatur*, 19 Ill. App. 204; *Chicago v. Chic., R. I. & P. R. Co.*, 152 Ill. 561, 38 N. E. Rep. 768; *Manrose v. Parker*, 90 Ill. 581; *Warren v. Jacksonville*, 15 Ill. 236; *Dexter v. Tree*, 117 Ill. 532, 6 N. E. Rep. 506; *Waring v. Little Rock*, 62 Ark. 408, 36 S. W. Rep. 24.

³ *Bagley v. New York, N. H. & H. R. Co.*, 165 Mass. 160.

⁴ *Campau v. Detroit*, 104 Mich. 560, 62 N. W. Rep. 718.

⁵ *Grose v. West*, 7 Taunt. 39; *Holmes v. Bellingham*, 7 C. B. N. S. 329; *Harrison v. Parker*, 6 East, 154; *Stevenson v. Chattanooga*, 20 Fed. Rep. 586; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Adams v. Emerson*, 6 Pick. 56; *Allen v. Boston*, 159 Mass. 324, 34 N. E. Rep. 519; *Knox v. New York*, 55 Barb. 404; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Tallmadge v. East River Bank*, 26 N. Y. 105, 108; *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207; *Spencer v. Metropolitan St. Ry. Co.*, 120 Mo. 154, 23 S. W. Rep. 126, 22 L. R. A. 668; *Dubuque v. Maloney*, 9 Iowa, 450, 455, 74 Am. Dec. 358; *Lamar County v. Clements*, 49 Tex. 347.

construct and maintain thereon a safe and convenient roadway, which shall at all times be free and open for public use as a highway.”¹

The use of a highway for a turnpike or toll-road imposes no additional burden upon the adjoining landowners, because the character of the easement is not changed, the road remaining a public highway.²

479. At common law the owner of the land abutting upon a highway has all the rights of property in the soil of the highway, subject to the easement of the public.³ He may mine under it, or he may dig up the soil, provided he does not interfere with the public convenience. He owns the trees growing upon it, and may maintain trespass against any one cutting them, or gathering their fruit,⁴ or for any other invasion of his possession.⁵ But, of course, the proper public guardians of the highway may cut down any trees which are a permanent obstruction to the use by the public of any part of the highway. “The right of the public is to have the whole width of the road preserved free from obstructions, and is not confined to that part which was used as the *via trita*.”⁶

Even if the trees do not obstruct the street, and the public convenience did not require their removal, it has been held that if the public authorities deem it best that they shall be removed, the abutting owner cannot recover damages for their destruction.⁷

¹ Sterling’s Appeal, 111 Pa. St. 35, 41, 2 Atl. Rep. 105, per Sterrett, J.

² State v. Hannibal & R. C. Gravel-road Co. (Mo.), 39 S. W. Rep. 910; Williams v. Natural Bridge Pl. Road Co., 21 Mo. 580; Carter v. Clark, 89 Ind. 238; Chagrin Falls & C. Plank Road Co. v. Cane, 2 Ohio St. 419; Panton Turnpike Co. v. Bishop, 11 Vt. 198; Callison v. Hedrick, 15 Gratt. 244; Douglass v. Road Co., 22 Md. 219, 85 Am. Dec. 647; Wright v. Carter, 27 N. J. L. 76; Walker v. Caywood, 31 N. Y. 51.

³ St. Mary, Newington v. Jacobs, L. R. 7 Q. B. 47; Lade v. Shepherd, 2 Strange, 1004; Grose v. West, 7 Taunt. 39; Doe v. Pearsey, 7 B. & C. 304; Stevenson v. Chattanooga, 20 Fed. Rep. 586; Kennedy v. Jones, 11 Ala. 63; Jackson v. Hathaway, 15 Johns.

447, 8 Am. Dec. 263; Knabe v. Levelle, 23 N. Y. Supp. 818; Williams v. N. Y. Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358; Bradley v. Pharr, 45 La. Ann. 426, 12 So. Rep. 618; Lankin v. Terwilliger, 22 Oreg. 97, 29 Pac. Rep. 268.

⁴ Turner v. Ringwood Highway Board, L. R. 9 Eq. 418; Daily v. State, 51 Ohio St. 348, 37 N. E. Rep. 710, 24 L. R. A. 724; Crismon v. Deck, 84 Iowa, 344, 51 N. W. Rep. 55.

⁵ Stevens v. Whistler, 11 East, 51; Lade v. Shepherd, 2 Strange, 1004.

⁶ Turner v. Ringwood Highway Board, L. R. 9 Eq. 418.

⁷ Tate v. Greensboro, 114 N. C. 392, 19 S. E. Rep. 767. See the dissenting opinion of Avery, J. Chase v.

The owner in fee of the highway is entitled to the herbage and crops that grow upon it, and to the mines and minerals beneath the surface.¹ He may construct beneath the surface passage-ways for water and other purposes, provided he does not interfere with the rights of the public. He is entitled to every right and profit which can be derived from his land occupied as a highway consistent with the easement of the public. A by-law of a town giving the inhabitants the right to pasture their cows in the public highways under certain regulations, passed under the authority of a statute authorizing such by-laws, is of no validity, and the statute itself invalid, unless it may be construed as authorizing only such regulations as will not conflict with the rights of the owner of the soil; for he is entitled to the herbage of that part of the highway which he owns in fee.²

480. A highway fenced on either side presumably extends over the entire space between the fences.³ The presumption is that such space was dedicated to the public and that the public are entitled to the whole of it, and are not confined to the parts that are traveled by carriages, used as gutters or occupied for footways or sidewalks.

But if the road is not enclosed there is no presumption that any land beyond the road actually used has been dedicated to the public.⁴

481. At common law when a highway not enclosed became foundrous, the public had a right to pass over the adjoining land.⁵ But if the highway was limited within defined limits, there was no right of deviation. If the owner of the soil obstructed the highway, the public were justified in deviating upon his land.⁶ "There are a great many *dicta* in the books, but they are all founded on

Oshkosh, 81 Wis. 313, 51 N.W. Rep. 560, 15 L. R. A. 553; Andrews v. Youmans, 78 Wis. 56, 47 N. W. Rep. 304; Viliski v. Minneapolis, 40 Minn. 304, 41 N. W. Rep. 1050, 3 L. R. A. 831; Smith v. City Council, 19 Ga. 89, 63 Am. Dec. 298.

¹ Mayhew v. Norton, 17 Pick. 357, 28 Am. Dec. 300; Adams v. Emerson, 6 Pick. 56; Dubuque v. Maloney, 9 Iowa, 450, 457, 74 Am. Dec. 358.

² Woodruff v. Neal, 28 Conn. 165.

³ Queen v. United Kingdom Tel. Co., 2 B. & S. 647, *note*.

⁴ Easton v. Richmond Highway Board, L. R. 7 Q. B. 69; Commonwealth v. Royce, 152 Pa. St. 88, 25 Atl. Rep. 162.

⁵ Taylor v. Whitehead, 2 Dougl. 745; Absor v. French, 2 Show. 28.

⁶ Leake, Pt. III., p. 494.

Duncomb's Case.¹ In that case there was a prescriptive highway, and when it was out of repair, the public used to deviate on the outlets, which I gather to be certain defined portions of ground, over which the public had immemorially passed. *Duncomb* had taken possession of the outlets, and therefore had deprived the public of them; and it was held that he was therefore bound to repair the road."²

In case the owner of the land had the right to plough up the way, when ploughing the field across which the way runs, it is reasonable that the public may have their prescriptive right to deviate on adjoining lands when the way is foundrous by reason of the ploughing. "Here," says Chief Justice Cockburn, "there has always been a right in the occupier of the land to plough up the path. The path has been in a known direction, and when the occupier of the land ploughs up the way it soon gets into a muddy state; but inasmuch as there has always been a right to plough it, the rights of the owner of the soil and of the public depend on the circumstance that the dedication is limited; and as the owner had reserved this right, the public must accept the terms upon which the way was dedicated."³

One has no easement of way over adjacent land because the highway has become impassable, even if he has a temporary right, in common with the traveling public, to pass over such land when the public road cannot be used; but this is not a right which is incident or appurtenant to his estate.⁴

482. When a highway is obstructed, the public may go *extra viam* upon the adjacent land, passing as near the public way as possible without being guilty of trespass.⁵ "The rule itself is founded on the established principles of the common law and is in accordance with the fixed and uniform usage of the community. Indeed,

¹ *Cro. Car.* 366; 1 *Rolle's Abr.* 390 725; *Henn's Case*, *W. Jones*, 296; (A.) pl. 1. *Pomfret v. Ricroft*, 1 *Saund.* 321; *Absor*

² *Arnold v. Holbrook*, *L. R.* 8 Q. B. 96.

³ *Arnold v. Holbrook*, *L. R.* 8 Q. B. 96, 100. And see *Arnold v. Blaker*, *L. R.* 6 Q. B. 433; *King v. Flecknow*, 1 *Burr.* 461.

⁴ *Carey v. Rae*, 58 *Cal.* 159.

⁵ 2 *Blackstone Com.* 36; 3 *Dane's Abr.* 258; *Young v. —*, 1 *Ld. Raym.*

v. French, 2 *Show.* 28; *Taylor v. Whitehead*, 2 *Doug.* 744; *Bullard v. Harri-son*, 4 *M. & S.* 387, 393; *Carey v. Rae*, 58 *Cal.* 159; *Campbell v. Race*, 7 *Cush.* 408, 54 *Am. Dec.* 728; *Holmes v. Seely*, 19 *Wend.* 507; *Williams v. Safford*, 7 *Barb.* 309; *Newkirk v. Sabler*, 9 *Barb.* 652.

one of the strongest arguments in support of it is, that it has always been practiced upon and acquiesced in, without objection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question in our courts, and is a sufficient answer to the objection upon this ground which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised that the right is well founded.”¹

483. The rule allowing such deviation is justified by inevitable necessity or accident. “If a traveler in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths, so that he cannot reach his destination without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveler, and render highways suddenly impassable, so that to advance or retreat by the ordinary path is alike impossible. In such cases, the only escape is by turning out of the usually traveled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created under such circumstances, sufficient to justify or excuse a traveler, it is difficult to imagine a case which would come within the admitted rule of law.”²

A slight deviation by reason of an obstacle in the way does not prevent the acquisition by the public of a way by prescription.³

484. But the public have no right to go at random over private land. “Nothing but absolute necessity justifies a traveler on a highway using the land of an adjoining owner without his consent, and he can use only what is absolutely required. It is not for

¹ Campbell v. Race, 7 Cush. 408, 411, W. Rep. 331; Kurtz v. Hoke, 172 Pa. 54 Am. Dec. 728, per Bigelow, J. St. 165, 37 W. N. C., 369, 33 Atl. Rep.

² Campbell v. Race, 7 Cush. 408, 411, 549; Ottawa v. Yentzer, 160 Ill. 509, 43 54 Am. Dec. 728. N. E. Rep. 601; Gentleman v. Soule, 32

³ Howard v. State, 47 Ark. 431, 2 S. Ill. 271, 83 Am. Dec. 264.

the traveler, for his convenience or at his will, to ramble over another's premises. He must go on it near to the highway, and so as to use such land no more than absolutely necessary. If he does not, he becomes a transgressor, and is liable to an action."¹

485. The owner of land adjoining a highway is entitled to access to it at any spot where it comes up to his land,² and he may have an action for the removal by injunction of any obstruction to such access; or he may have an action for damages.³

The fact that a portion of the highway adjoining his land has been paved and used as a footway for many years, does not deprive him of the right to cross such footway with heavy teams to reach his own premises. "The owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public. If this were not so, the owner of a large estate, having dedicated a portion of his land to the use of the public as a roadway, and they, or the persons representing them, having raised a footpath on one side of such roadway for their own more convenient use thereof, would, after a lapse of time, be so bound by this convenient arrangement of such roadway as to be unable to open a new gateway or entrance to his land from such roadway, without being liable to be convicted under the provisions of the highway act. If this were really the law, the result would be most serious to owners who have dedicated, or may dedicate, roadways to the public; and in towns would, to a great extent, prevent the owners of houses and buildings from changing their character and use to any purpose of business which could not be accomplished without the use of a horse, or cart, or carriage."⁴

¹ *White v. Wiley*, 59 Hun, 618, 13 N. Y. Supp. 205, 36 N. Y. St. 102, per Putnam, J.; *Holmes v. Seely*, 19 Wend. 510; *Williams v. Safford*, 7 Barb. 309; *Bullard v. Harrison*, 4 Maule & S. 387, 392.

² *Lyon v. Fishmongers' Co.*, L. R. 1

App. Cas. 662; *Marshall v. Ulleswater Co.*, L. R. 7 Q. B. 166.

³ *Caledonian Ry. Co. v. Walker*, 7 App. Cas. 259; *Knox v. New York*, 55 Barb. 404.

⁴ *St. Mary, Newington v. Jacobs*, L. R. 7 Q. B. 47, 53, per Mellor, J.

486. Lands taken by the public or dedicated to the public for a street, cannot be used for some other purpose¹ not consistent with its use as a street. The owner is divested of his property only as regards the use of it for a street. The property in the soil remains in the former owner, and only the use of it for a street is taken by the public, or dedicated to the public. If, therefore, the town or city proceeds to use such street for a different purpose, such as the sinking of artesian wells, the former owner may have an injunction restraining such use.

Even under laws by which a town or city acquires in fee land dedicated to public use as highways, the title in fee is subject to the purpose of the dedication, and the land cannot be used for any other purpose inconsistent with that.²

487. A highway dedicated to the public can be used by the public for only such purposes as a highway is usually and properly used for.³ Where land was dedicated to the public for use as a public square, the municipal authorities were prohibited from making use of the land for purposes inconsistent with its use as a public square.⁴

The moving of a house along a public street is not within the rights of the public, as a use of the street.⁵

¹ *Payne v. Kansas & A. Val. R. Co.*, 46 Fed. Rep. 546; *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *State v. Laverack*, 34 N. J. L. 201; *Knox v. New York*, 55 Barb. 404; *Belcher Sugar Ref. Co. v. St. Louis Grain El. Co.*, 82 Mo. 121; *Williams v. Natural Bridge Pl. Road Co.*, 21 Mo. 580; *Lutterloh v. Cedar Keys*, 15 Fla. 306; *Pennsylvania R. Co. v. Montgomery County P. R. Co.*, 167 Pa. St. 62. *O'Neal v. Sherman*, 77 Tex. 182, 14 S. W. Rep. 31, *Hobby, J.*, said: "The rule that land taken by the public for a certain use cannot be appropriated to another use to the detriment of the owner affords the only adequate protection of the citizen's constitutional right to be compensated for the condemnation or use of his property for the public benefit."

² *Railroad Co. v. Schurmeir*, 7 Wall.

³ *Stevenson v. Chattanooga*, 20 Fed. Rep. 586.

⁴ *Cincinnati v. White* 6 Pet. 431; *Princeville v. Auten*, 77 Ill. 327; *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540; *Abbott v. Mills*, 3 Vt. 521, 23 Am. Dec. 222; *State v. Catlin*, 3 Vt. 530, 23 Am. Dec. 230; *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207; *McCullough v. San Francisco*, 51 Cal. 418; *Church v. Portland*, 18 Oreg. 73, 22 Pac. Rep. 528, 27 Am. & Eng. Corp. Cas. 29, 6 L. R. A. 259; *Campbell County v. Newport*, 12 B. Mon. 538; *Lamar County v. Clements*, 49 Tex. 347; *Harris County v. Taylor*, 58 Tex. 690; *Llano v. Llano County*, 5 Tex. Civ. App. 132, 23 S. W. Rep. 1008.

⁵ *Dickson v. Kewanee Elec. L. & M. Co.*, 53 Ill. App. 379; *New York & N. J. Tel. Co. v. Dexheimer*, 14 N. J. L. J. 295.

The Legislature has no power to authorize the building of a market in a public street without providing compensation to the owners of the contiguous lands who own to the center of the street.¹ The construction of a toll-keeper's house within the lines of a highway over which a turnpike road is built, without the consent of the abutting owner, is an imposition of an additional servitude which the owner may have restrained by injunction.²

A dedication may be made, however, for public use as a highway subject to a right to devote a part of it to use for railroad purposes, and the use of it as a highway will be suspended and remain suspended while it is used for railroad purposes.³

488. An abutting owner has a property right in the use of the street in front of his land as a means of ingress and egress and for light and air; and any structure on the street which interferes with such use and its use as a public thoroughfare imposes a new servitude for which he is entitled to compensation.⁴ "It is quite generally agreed that any proper exercise of governmental power over a street in a municipality, for street purposes, which does not directly encroach upon the abutting property of an individual, though the consequences may be to impair its use, is not a taking within the meaning of the Constitution, and will not entitle the adjoining proprietor to compensation, or give him a right of action.⁵ It is within this principle that changes of grade; the use of a street for a surface street railroad; the erection of lamps, hitching posts, telephone, telegraph, and electric light poles; the laying of sewer and water pipes; the crossing of streets over railway

¹ State v. Laverack, 34 N. J. L. 201; Lutterloh v. Cedar Keys, 15 Fla. 306.

² Perkins v. Moorestown & C. T. Co., 48 N. J. Eq. 499, 22 Atl. Rep. 180.

³ Ayres v. Pennsylvania R. Co. (N. J.) 20 Atl. Rep. 54.

⁴ Lincoln Rapid Transit Co. v. Rundie, 34 Neb. 559, 52 N. W. Rep. 563; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. Rep. 788; Dill v. Camden Board of Education, 47 N. J. Eq. 421, 20 Atl. Rep. 739; American Bank Note Co. v. El. R. Co., 129 N. Y. 252, 29 N. E. Rep. 302; Drucker v. Manhattan R. Co., 106 N. Y. 157, 12 N. E. Rep. 568; Lahr v. Met. El. R. Co., 104 N. Y.

268, 10 N. E. Rep. 528; Story v. N. Y. El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; *In re* El. R. Co., 70 N. Y. 327; Kane v. New York El. R. Co., 125 N. Y. 164, 28 N. E. Rep. 278, 11 L. R. A. 640; Hine v. N. Y. El. R. Co., 54 Hun, 425; Lamm v. Chicago, St. P., M. & O. R. Co., 45 Minn. 71, 47 N. W. Rep. 455, 10 L. R. A. 268; Adams v. Chicago, B. & N. R. Co., 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493; Onset St. R. Co. v. County Commissioners, 154 Mass. 395, 28 N. E. Rep. 286.

⁵ Cooley on Constitutional Limitations (5th ed.) 671; Transportation Company v. Chicago, 99 U. S. 635.

tracks by means of elevated viaducts, are, when authorized by lawful authority, held *damnum absque injuria*, although the abutting owner may be seriously injured, and the value and usefulness of his property greatly impaired. This is upon the ground that individual interests in streets are subservient to those of the public, and that an adjoining owner received full compensation for such injury as might result to him or his grantees from the use of the street for proper street purposes at the time of the dedication or appropriation of the land therefor. But there is a limitation to legislative or municipal power over a street, which cannot be exceeded without invading the constitutional rights of abutting owners. An abutting proprietor is entitled to the use of the street in front of his premises to its full width as a means of ingress and egress, and for light and air, and this right is as much property as the soil within the boundaries of his lot; and therefore any impairment thereof or interference therewith, caused by the use of the street for other than legitimate street purposes, is a taking within the meaning of the Constitution, whether the fee of the street is in the abutting owner or not.”¹

489. Owners of land abutting upon public streets, even in case the fee of the street is in the municipality, have an easement in the streets, not only for ingress and egress, but also for the uninterrupted passage of light and air.² They have the right to demand damages from any one who uses the streets for other than street purposes. Even legislative authority cannot sanction the use of streets for purposes other than those for which the streets were obviously intended, or other than those which have been recognized by long continued usage. New uses of streets coming within such intention or usage may be authorized by legislation. “Such are the cases in respect to changes of grade; the use of a street for a surface horse railroad; the laying of sewers, gas and water pipes beneath the soil; the erection of street lamps and hitching-posts, and of poles for electric lights used for street lighting.”³

¹ *Willamette Iron Works v. Oregon R. & N. Co.*, 26 Oreg. 224, 227, 37 Pac. Rep. 1016, per Bean, C. J.

² *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528; *Story v. N. Y. El. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Mattlage v. New York El. R. Co.*, 11 N. Y. Supp. 482.

³ *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, 292, 10 N. E. Rep. 528, per Ruger, Ch. J.; *Lamm v. Chicago St. P. M. & O. Ry. Co.*, 45 Minn. 71, 47 N. W. Rep. 455; *Adams v. Chicago B. & N. R. Co.*, 39 Minn. 286, 39 N. W. Rep. 629.

An owner whose land abuts upon a highway necessarily enjoys certain advantages from the existence of an open street adjoining his property which belong to him by reason of the location of the street, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property.¹

490. The public may use a highway for many other objects necessary for the public convenience and health, besides the primary purpose of traveling upon it. "Whatever may have been the ancient adjudications limiting the rights of the public in the streets to passage and repassage, and whatever may now be the rule with regard to highways in the country, with the growth of population in our cities have come increased needs for heating, lighting, draining, sewerage, water, etc., and with these has come also a corresponding extension of the public rights in the streets. Immense sewers and water mains may be dug, and the soil removed, culverts and drains constructed, without compensating the abutting owners. It may now be considered the well-settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it."²

A highway may be properly used by the public authorities for constructing in it a reservoir to be used for retaining water to sprinkle the highway with; and the owner of the fee of the land, where such reservoir is placed, cannot maintain an action against such authorities for so doing.³ But the erection of a water-tank in the center of a street, occupying one-half its width, and the operation of a steam engine in connection therewith for the purpose of supplying the city and its residents with water, is not a use for which the street can appropriately be put, and the owner of

¹ *Story v. New York El. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Maysville B. & S. R. Co. v. Ingram* (Ky.) 30 S. W. Rep. 8; *Elizabethtown L. & B. S. R. Co. v. Combs*, 10 Bush, 382; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 294.

² *Detroit City Railway v. Mills*, 85 Mich. 634, 653, 48 N. W. Rep. 1007, per Grant, J., citing Ang. Highw.

§ 312; *Warren v. Grand Haven*, 30 Mich. 24; *Palatine v. Kreuger*, 121 Ill. 72, 12 N. E. Rep. 75; *Murray v. Commissioners*, 12 Metc. 455; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Boston v. Richardson*, 13 Allen, 146; *Allen v. Boston*, 159 Mass. 324, 34 N. E. Rep. 519.

³ *West v. Bancroft*, 32 Vt. 367.

the adjoining land is entitled to damages in consequence of such erection.¹

491. A highway may properly be used for the laying of gas pipes in trenches beneath the surface, if so laid as not in any manner to obstruct or endanger public travel;² but such pipes could not properly be laid upon the surface of the ground.³

In cities, boroughs, and populous towns, the streets may be used for laying gas pipes beneath the surface, and it is generally held that such addition imposes no additional servitude. But the same rule is held not to apply with respect to public roads in rural districts. Thus it has been held that a gas light company has no authority to lay its pipes in a country highway without the consent of the abutting landowners, and the payment of compensation to them.⁴

A pipe line laid in a country highway under the surface is held to impose an additional burden on the land not contemplated either by the owner or by the public authorities, when the land was dedicated or appropriated for the purpose of a public road. "It is a burden, moreover, which, to some extent, at least, abridges the rights of the landowner in the soil traversed by the road, and hence it is a taking within the meaning of the constitutional provision requiring just compensation to be made for property taken, injured or destroyed."⁵

492. The use of the streets for the laying of water pipes for supplying the inhabitants of cities and towns with water is a proper use of the streets, and imposes no additional burden for which an abutting owner can recover damages.⁶

Whether the streets can be used by private individuals, without the consent of the abutting owners, for the laying of water pipes for their own exclusive use, even with the consent of the municipal authorities, is a question upon which contrary views may well be entertained; though the decisions generally sanction such a use when this is sanctioned by custom or necessity.⁷

¹ Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77.

² 2 Dillon Mun. Corp. § 691.

³ Lebanon Light H. & P. Co. v. Leap, 139 Ind. 443, 39 N. E. Rep. 57.

⁴ Bloomfield & Rochester Nat. Gas Light Co. v. Calkins, 62 N. Y. 386, 1 T. & C. 541.

⁵ Sterling's Appeal, 111 Pa. St. 35, 41, 2 Atl. Rep. 105, 56 Am. Rep. 246,

per Sterrett, J.; Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577, 19 Am. St. Rep. 113, 24 N. E. Rep. 1066, 3 Am. R. & Corp. Rep. 1.

⁶ Crooke v. Flatbush Water Works Co., 29 Hun, 245, 27 Hun, 72.

⁷ Smith v. Simmons, 103 Pa. St. 32; Susquehanna Depot v. Simmons, 112 Pa. St. 384, 5 Atl. Rep. 434.

The owner of the land so taken may sink a drain or any water course below the surface of the land covered by the way, provided the public easement is not interfered with. If a highway be located over a water course, either natural or artificial, the public cannot shut up such water course, but may build the road over it by the aid of bridges. "But when a way has been located over private land, if the owner should afterwards open a water course across the way, it will be his duty, at his own expense, to make and keep in repair a way over the water course for the convenience of the public."¹

493. The laying of a public sewer in a street is a use incident to the purposes for which the street was dedicated,² and an appropriate and customary mode of using it. "To put a sewer in a public street in a city is simply to use the street in a manner which is necessarily incident to the use for which streets are opened and laid out in cities. It is a part of the purpose in view, when land is taken or dedicated for use as a public street in a city, that it shall be used not only for the purposes of mere passage and repassage, but for all such incidental purposes, including the building of sewers therein, as may be necessary, appropriate and usual for the proper enjoyment of such street."³

The construction by the commonwealth of a metropolitan system of sewers under a highway does not create an additional servitude for which damages can be claimed by the owner of

¹ *Perley v. Chandler*, 6 Mass. 453, 458, 4 Am. Dec. 159, per Parsons, C. J.

² *Allen v. Boston*, 159 Mass. 324, 34 N. E. Rep. 519; *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. Rep. 711; *Warren v. Grand Haven*, 30 Mich. 24; *Kelsey v. King*, 32 Barb. 410; *Milhau v. Sharp*, 15 Barb. 193, 210; *Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73; *Stoudinger v. Newark*, 28 N. J. Eq. 187, 446; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Paterson & P. H. R. Co. v. Paterson*, 24 N. J. Eq. 158; *Glasby v. Morris*, 18 N. J. Eq. 72; *Michener v. Philadelphia*, 118 Pa. St. 535, 12 Atl. Rep. 174, 11 Cent. Rep. 398; *White v. Yazoo*, 27 Miss. 357; *Fisher v. Harrisburg*, 2 Grant Cas. 291; *Cone v. Hart-*

ford, 28 Conn. 363; *West v. Bancroft*, 32 Vt. 367.

³ *Matter of City of Yonkers*, 117 N. Y. 564, 573, 23 N. E. Rep. 661, per Peckham, J. To like effect, see *Boston v. Richardson*, 13 Allen, 146, where Judge Gray said: "Whenever land is taken for public use as a highway, and due compensation made, the public have a right to make any use of the land directly or incidentally conducive to the enjoyment of the public easement, and such uses clearly include the making of culverts, drains, and sewers under the highway, for the cleansing of the streets and the accommodation of the inhabitants on either side."

the fee.¹ A city or town has the same right to use a highway for an under ground sewer without the payment of damages to the owner of the fee.²

But the right to lay a drain for private purposes along a highway is one which the public authorities have no power to grant as against the abutting owner, in whom is vested the fee of the street, for as to him the drain would impose an additional burden and servitude upon his land.³

VI. *Telegraph and Telephone Lines in Highways.*

494. The use of a highway for a telegraph or telephone line does not entitle the owner of the fee of the highway to additional compensation. Such use is not regarded as an additional servitude. "It is a newly discovered method of exercising the old public easement, and all appropriate methods must be deemed to have been paid for when the road was laid out. * * * We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the State for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the Legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation."⁴

There are, however, many decisions holding that a telegraph or telephone line cannot be established in a street without compensation to the abutting owners for the damage to their property.⁵

¹ *Lincoln v. Commonwealth*, 164 Mass. 1.

² *Titus v. Boston*, 161 Mass. 209, 212.

³ *Murray v. Gibson*, 21 Ill. App. 488.

⁴ *Pierce v. Drew*, 136 Mass. 75, 82, 49 Am. Rep. 7, per Devens, J.; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623; *Julia Build. Asso. v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398; *West. Union Tel. Co. v. Guernsey*, 46 Mo. App. 120; *Gay v. Mut. Union Tel. Co.*, 12 Mo. App. 485; *Forsythe v. Baltimore & O. Tel. Co.*, 12 Mo. App. 494; *Irwin v. Great Southern Tel. Co.*, 37 La. Ann. 63; *Hershfield v. Rocky Mt. Bell Tel. Co. (Mont.)*, 29, Pac. Rep. 883.

⁵ *Pacific P. Tel. Cable Co. v. Irvine*, 49 Fed. Rep. 113; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Eels v. American T. & T. Co.*, 143 N. Y. 133, 38 N. E. Rep. 202, 25 L. R. A. 640; *Blashfield v. Empire State T. & T. Co.*, 18 N. Y. Supp. 250; *Met. Tel. & Tel. Co. v. Colwell Lead Co.*, 18 J. & S. 488, 67 How. Pr. 365; *Dusenbury v. Mut. Tel. Co.*, 11 Abb. N. C. 440; *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. Rep. 106, 14 Va. L. J. 263, 8 L. R. A. 429, 19 Am. St. Rep. 908; *Stowers v. Postal T. Cable Co.*, 68 Miss. 559, 24 Am. St. Rep. 290, 9 So. Rep. 356, 12 L.

A distinction is made between the use of a street by telephone and telegraph companies and its use by street railways, whose motive power is electricity conveyed through wires strung over the street, in this, that the latter use of a street is consistent with the character of the highway, while its use for telephone and telegraph wires and poles is not.¹

A bill by an abutting landowner to enjoin a telephone company from laying its conduits under the sidewalk, which does not allege that plaintiff owned the fee in the walk or the street, or that the walk or street was dedicated to the public by one who at the time owned the fee, is demurrable.²

495. But the privilege of erecting poles and stringing wires along the street, granted by municipal authority, confers no right to interfere with or destroy private property, and an abutting owner, whose title extends to the center of the street, may recover damages against an electric company caused by the unnecessary cutting of limbs from shade trees standing in the street immediately in front of his premises.³

But where a telephone company was authorized by law to erect poles and stretch wires through the streets of a city, and it was afterwards required by ordinance to move its poles and wires from a street to an adjoining sidewalk, and in doing so it became necessary to trim certain trees, and this was done by the servants of the company, under the direction of a city officer, the company was not

R. A. 864; Chesapeake & P. Tel. Co. v. MacKenzie, 74 Md. 36, 21 Atl. Rep. 690; American Tel. & T. Co. v. Pearce, 71 Md. 535, 1 Am. R. & Corp. Rep. 73; Broome v. New York & N. J. Tel. Co., 42 N. J. Eq. 141, 7 Atl. Rep. 851. In New Jersey compensation is now required by statute, Act March 11, 1880, Supp. Rev. Stat. p. 1022. Winter v. New York & N. J. Tel. Co., 51 N. J. L. 83; Broome v. New York & N. J. Tel. Co., 49 N. J. L. 624, 9 Atl. Rep. 754; Smith v. Cent. Dist. Print. & Tel. Co., 2 Ohio C. Ct. 259; Willis v. Erie Tel. & Tel. Co., 37 Minn. 347, 34 N. W. Rep. 337. Preliminary injunctions to restrain telegraph companies from stringing wires over a street in front of complainant's land have been denied

on the ground that the injury, if any, is not irreparable. Roake v. Amer. Tel. Co., 41 N. J. Eq. 35, 2 Atl. Rep. 618; Hewett v. Western U. Tel. Co., 4 Mack. 424; McCormick v. Dist. Columbia, 4 Mack. 396, 54 Am. Rep. 284.

¹ Halsey v. Rapid Trans. St. R. Co., 47 N. J. Eq. 380, 20 Atl. Rep. 859; Dean v. Ann Arbor St. Ry. Co., 93 Mich. 330, 53 N. W. Rep. 396.

² Erwin v. Central Union Tel. Co. (Ind.) 46 N. E. Rep. 667.

³ Gorham v. Eastchester Elec. Co., 80 Hun, 290, 61 N. Y. St. 839, 30 N. Y. Supp. 125; Daily v. State, 51 Ohio St. 348, 37 N. E. Rep. 710, 24 L. R. A. 724; O'Connor v. Nova Scotia Teleph. Co., 22 Can. Supr. Ct. 276.

liable therefor in an action by the owner of the trees, since the act was necessary and was done under lawful authority.¹

496. In some cases a distinction is made between streets in a city and roads in a country as to the right to erect telephone and telegraph poles and wires, without compensation to the abutting owners. "The use to which streets in a town or city may be lawfully put are greater and more numerous than in the case of an ordinary road or highway in the country. With reference to the latter, as we have just observed, all the public acquires is the easement of passage and its incidents, and hence the owner of the soil parts with this use only, retaining the soil, and by virtue of this ownership is entitled, except for the purposes of repair, to the earth, timber, and grass growing thereon and to all minerals, quarries, and springs below the surface. But, with respect to streets in populous places, the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street, and may make culverts, drains and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam and other things capable of that mode of distribution. Subject to these and other like rights of the municipality and the public to the use of a street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation, for additional servitudes placed thereon, that the owner of the bed of a highway in the country is entitled to."²

497. As between a telephone company which has erected its poles and wires in streets, and an electric railway which has sub-

¹ Southern Bell Telephone & Tel. Co. v. Constantine, 61 Fed. Rep. 61; Bills v. Belknap, 36 Iowa, 583.

² Chesapeake & Potomac Tel. Co. v. Mackenzie, 74 Md. 36, 47, 21 Atl. Rep. 690, per McSherry, J. See also Western Railway v. Ala. Grand T. R. Co., 96 Ala. 272, 282, 11 So. Rep. 483, where Thorington, J., said: "In many respects a broad distinction is recognized in the authorities between urban and

suburban and rural servitudes. A vast variety of uses to which the first may be applied without compensation to the owner of the ultimate fee, as having been within contemplation when the street was dedicated or condemned, would be an additional burden for which compensation must be made to owners of abutting property when the highway is a suburban or country road."

sequently put its road in operation in the same streets, both companies acting under proper authority, the telephone company, in the use of the streets, has no right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system the remedy of the telephone company is to substitute wires for the return circuit instead of using a grounded circuit. The use of telephone appliances in the public streets is not among the primary objects for which streets are opened. They are not used to facilitate travel and transportation; "whereas the poles and wires of the railway company are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street cars are propelled."¹ The reason for the rule adopted is further stated in the Ohio case above cited by Mr. Justice Dickman, who said: "As against the public easement in the highway, a telephone company that obtains the naked permission to locate its poles and wires along the streets, should, we think, stand on no higher vantage ground than the owners of property abutting on the streets, who hold or acquire their property subject to all the consequences which may result, advantageously or otherwise, from any public and authorized use of the streets, in any mode promotive of, and consistent with, the purposes of establishing them as common highways. This paramount easement or estate which the public acquires in the streets, carrying with it a special interest in the adoption of the most approved systems of modern street travel, cannot be made subservient to the telephone or telegraph when admitted on the highway, without the clearest expression of the legislative will."

498. The streets may very properly be used for placing thereon poles and wires for lighting the streets by electricity without making compensation to abutting owners. This is clearly the law in case such wires and poles are used exclusively for the purpose of lighting the streets, for it is the duty of the public authorities to provide for lighting the streets, and they may use the method of lighting that seems to them best.² But if the poles and wires are

¹ *Railway Co. v. Telegraph Asso.*, 48 Ohio St. 390, 426, 12 L. R. A. 534, 27 N. E. Rep. 890, where the above quotation is taken from *Taggart v. Newport St. R. Co.*, 16 R. I. 668. To like effect, see *Hudson River Telephone Co. v. Watervliet T. & R. Co.*, 121 N. Y. 397, 24 N. E. Rep. 832.

² *People v. Thompson*, 65 How. Pr. 407, 32 Hun, 93; *Electric Constr. Co.*

erected not exclusively for public use, but in part for private lighting, it seems that the consent of the abutting owners should be obtained, and the erection of poles and wires for such purpose might be enjoined, if such consent has not been given.¹

In Massachusetts poles and wires for electric lighting may be placed in highways in the same manner as poles and wires for telegraph and telephone purposes. The abutting owners are entitled to compensation for any injury to their property.²

In Illinois, cities and villages, under the general corporation law, are made the representatives of the State with respect to the control of the streets and highways, and may grant the right to erect poles and wires to supply electric light to consumers.³

VII. *Street Railroads in Highways.*

499. The use of a highway for the operation of a street railway by horses is not a new servitude which entitles the owner of the fee of the highway, or of property abutting upon it, to further compensation.⁴ "We do not think the construction and operation of a

v. Heffernan, 34 N. Y. St. Rep. 436, 12 N. Y. Supp. 336.

¹ *Tiffany v. U. S. Illuminating Co.*, 19 J. & S. 280, 67 How. Pr. 73; *Johnson v. Thompson-Houston Electric Co.*, 7 N. Y. Supp. 716; *Haverford Electric L. Co. v. Hart*, 1 Pa. Dist. Ct. 571. See *Electric Construction Co. v. Heffernan*, 12 N. Y. Supp. 336, where an abutting owner was restrained from cutting down poles erected under proper authority.

² Pub. Stats. ch. 109; Acts 1883, ch. 221; Acts 1889, ch. 398; Acts 1895, ch. 350; *Suburban Light & Power Co. v. Boston*, 153 Mass. 200, 26 N. E. Rep. 447, 10 L. R. A. 497.

³ *Dickson v. Kewanee Elec. L. & M. Co.*, 53 Ill. App. 379. And see *McCartney v. C. & E. R. Co.*, 112 Ill. 611. As to Missouri, see *Western Union T. Co. v. Guernsey & Scudder L. Co.*, 46 Mo. App. 120.

⁴ **California**: *Finch v. Riverside & A. R. Co.*, 87 Cal. 597, 25 Pac. Rep. 765; *Carson v. Central R. Co.*, 35 Cal. 325;

Market Street R. Co. v. Cent. R. Co., 51 Cal. 583.

Connecticut: *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579.

Florida: *State v. Jacksonville Street R. Co.*, 29 Fla. 590, 10 So. Rep. 590; *Randall v. Jacksonville Street R. Co.*, 19 Fla. 409, 17 Am. & Eng. R. Cas. 184.

Georgia: *Campbell v. Met. Street R. Co.*, 82 Ga. 320, 9 S. E. Rep. 1078; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *South Carolina R. Co. v. Steiner*, 44 Ga. 546.

Indiana: *Eichels v. Evansville Street R. Co.*, 78 Ind. 261, 41 Am. Rep. 561.

Iowa: *Stanley v. Davenport*, 54 Iowa, 463, 2 N. W. Rep. 1064, 6 N. W. Rep. 706; *Sears v. Marshalltown R. Co.*, 65 Iowa, 742, 23 N. W. Rep. 150; *Clinton v. Railroad Co.*, 24 Iowa, 455.

Louisiana: *Brown v. Duplessis*, 14 La. Ann. 842.

Maine: *Briggs v. Lewiston & Auburn H. R. Co.*, 79 Me. 363, 10 Atl. Rep. 47.

Maryland: *Peddicord v. Baltimore, C.*

street railroad in a street is a new and different use of the land from its use as a highway. The modes of using a highway strictly as a highway are almost innumerable, and they vary and widen with the progress of the community. * * * The laying down rails in the street, and the running street cars over them, for the accommodation of persons desiring to travel on the street, is only a later mode of using the land as a way, using it for the very purpose for which it was originally taken. It may be a change in the mode, but it is not a change in the use. The land is still used for a highway."¹

& E. Pass. R. Co., 34 Md. 463; *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603; *Hiss v. Baltimore H. Pass. R. Co.*, 52 Md. 242, 36 Am. Rep. 371.

Massachusetts: *Attorney-General v. Met. R. Co.*, 125 Mass. 515, 28 Am. Rep. 264; *Onset Street R. Co. v. County Commissioners*, 154 Mass. 395, 28 N. E. Rep. 286. And see *Pierce v. Drew*, 136 Mass. 75.

Michigan: *People v. Fort Wayne & E. R. Co.*, 92 Mich. 522, 52 N. W. Rep. 1010, 16 L. R. A. 752; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. Rep. 1007; *Nichols v. Ann Arbor & Y. R. Co.*, 87 Mich. 361, 49 N. W. Rep. 538; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

Minnesota: *Elfelt v. Stillwater St. R. Co.*, 53 Minn. 68, 55 N. W. Rep. 116.

Missouri: *Ransom v. Citizens' R. Co.*, 104 Mo. 375, 16 S. W. Rep. 416.

New Jersey: *Van Horne v. Newark P. R. Co.*, 48 N. J. Eq. 332, 21 Atl. Rep. 1034; *Citizens' Coach Co. v. Camden H. R. Co.*, 33 N. J. Eq., 267, 36 Am. Rep. 542; *Hinchman v. Paterson H. R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 20 N. J. Eq. 61.

New York: *Mahady v. Bushwick R. Co.*, 91 N. Y. 148, 43 Am. Rep. 661; *People v. Kerr*, 27 N. Y. 188; *Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co.*, 33 Barb. 420; *Hussner v. Brooklyn C. R. Co.*, 114 N. Y. 433, 21 N. E. Rep. 1002, 11 Am. St. Rep. 679; *Mason v.*

Brooklyn City & N. R. Co., 35 Barb. 373; *Kane v. New York El. R. Co.*, 125 N. Y. 164, 176, 26 N. E. Rep. 278, per *Andrews, J.*; *Kellinger v. Forty-second St. & G. S. F. R. Co.*, 50 N. Y. 206.

Ohio: *Cincinnati Street R. Co. v. Cumminsville*, 14 Ohio St. 523.

Pennsylvania: *Pennsylvania R. Co. v. Montgomery County P. R. Co.*, 167 Pa. St. 62; *Rafferty v. Cent. Traction Co.*, 147 Pa. St. 579, 23 Atl. Rep. 884, 6 Am. R. & Corp. Rep. 287; *Lockhart v. Railway Co.*, 139 Pa. St. 419, 21 Atl. Rep. 26.

Tennessee: *Railroad Co. v. Bingham*, 87 Tenn. 522, 11 S. W. Rep. 705; *Smith v. Street R. Co.*, 87 Tenn. 626, 11 S. W. Rep. 709; *Street R. Co. v. Doyle*, 88 Tenn. 747, 13 S. W. Rep. 936, 9 L. R. A. 100, 17 Am. St. Rep. 933.

Texas: *Texas & Pac. R. Co. v. Rose-dale St. R. Co.*, 64 Tex. 80, 53 Am. Rep. 739.

Wisconsin: *Hobart v. Milwaukee R. Co.*, 27 Wis. 194, 9 Am. Rep. 461.

There are a few exceptional cases in which it has been held that a horse railroad is an additional burden upon the streets, for which the abutting owners are entitled to compensation. *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404; *Indianapolis B. & W. R. Co. v. Hartley*, 67 Ill. 439, where the fee was in the public.

¹ *Briggs v. Lewiston & Auburn H. R. Co.*, 79 Me. 363, 366, 10 Atl. Rep. 47, per *Emery, J.*

500. The consent of the municipality to use a street for the purpose of a street railroad must first be obtained; and a street railway company may be enjoined by the owner of property abutting on the street from building its road in the street without having first obtained such consent.¹ An injunction will not issue at the instance of the owner unless he will suffer some special and serious injury from the building of the road, distinct from that which will be suffered by the public at large.²

A road constructed without authority of law is an invasion of the public easement and therefore is a public nuisance.³

The laying of a street railroad track so close to the sidewalk that vehicles cannot stand between the curbing and the tracks affords no ground of action by the abutting owner.⁴

501. The use of a street by a cable railway company is not an additional servitude. "Whether the motive power of the cars be horses, electricity, or a submerged cable makes no difference in the use, and no one of these modes of use confers any right of action upon the abutting owner."⁵

The fact that a street railway company holds a franchise to operate a cable railway in certain streets, but instead of complying with the conditions of the franchise, operates a horse railway, does not constitute the horse railway a nuisance, which can be abated by the municipal corporation at its pleasure; but the proper course in such case is to take such legal proceedings as will compel the operation of the road by cable rather than by horses.⁶

502. Whether the operation of a street railroad by the use of steam as a motive power is an additional burden, which cannot be imposed without the consent of the abutting owners, is a question

¹ Thomas v. Inter-County Street R. Co., 167 Pa. St. 120.

² Van Horne v. Newark P. R. Co., 48 N. J. Eq. 332, 21 Atl. Rep. 1034.

³ Van Horne v. Newark P. R. Co., 48 N. J. Eq. 332, 21 Atl. Rep. 1034; Finch v. Riverside & A. R. Co., 87 Cal. 597, 25 Pac. Rep. 765.

⁴ Rafferty v. Cent. Trac. Co., 147 Pa. St. 579, 23 Atl. Rep. 884, 6 Am. R. & Corp. Rep. 287; Kellinger v. Forty-second Street & G. S. F. R. Co., 50 N. Y. 206.

⁵ Rafferty v. Cent. Trac. Co., 147 Pa.

St. 579, 23 Atl. Rep. 884, 6 Am. R. & Corp. Rep. 287; Matter of Petition of Third Ave. R. Co., 121 N. Y. 536, 24 N. E. Rep. 951; Lorie v. North Chicago City R. Co., 32 Fed. Rep. 270. See also Indianapolis Cable St. R. Co. v. Citizens' Street R. Co., 127 Ind. 369, 24 N. E. Rep. 1054, 26 N. E. Rep. 893, 8 L. R. A. 539, 43 Am. & Eng. R. Cas. 234; Brady v. Kansas City Cable R. Co., 111 Mo. 329, 19 S. W. Rep. 953.

⁶ Spokane Street R. Co. v. Spokane Falls, 6 Wash. 521, 33 Pac. Rep. 1072.

upon which there is a division of authority. The cases which hold that such use of a street is not an additional burden start with the proposition that a street railroad, however operated, is only a modern and improved use of the street as a public way. They assert that the kind of motor used is not the criterion; but the use of the street.¹

503. The construction of an electric railway operated by an overhead trolley system in a public way is not a new use or the taking of a new easement which entitles the landowners to compensation in damages.² Chief Justice Field, delivering the judgment of the Supreme Court of Massachusetts, to this effect, said: "The test whether the land under a street is subjected to a new use by the operation of new forms of transportation of persons or things is undoubtedly in some respects a question of degree, but the solution of it does not depend so much upon the kind of power used as upon the structures which are required and the change in the occupation and use of the street occasioned by the new form of transportation. * * * Electric railways, such as are shown in the present cases, are undoubtedly an approach in construction and in the manner of operation to the steam railroad, but so long as the companies are authorized to use the streets only in common with other travelers, and their structures do not prevent other travelers from using them in the ordinary way, and do not furnish any greater obstruction to light and air than appears in the present cases, this use does not seem to us to constitute a new taking of land, or of easements in land, for which compensation must be made."³

¹ Briggs v. Lewiston & Auburn Horse R. Co., 79 Me. 363, 10 Atl. Rep. 47; Williams v. City Electric Street R. Co., 41 Fed. Rep. 556; Newell v. Minneapolis L. & M. R. Co., 35 Minn. 112, 27 N. W. Rep. 839, Mitchell, J., dissenting; Montgomery v. Santa Ana W. R. Co., 104 Cal. 186, 37 Pac. Rep. 786, 25 L. R. A. 654; McCartney v. Chicago, & E. R. Co., 112 Ill. 611.

That such a road operated by steam is an additional burden, see Nichols v. Ann Arbor & Y. St. R. Co., 87 Mich. 361, 49 N. W. Rep. 538, 16 L. R. A. 371; East End St. R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. Rep. 936, 9 L.

R. A. 100, 17 Am. St. Rep. 933; Railroad Co. v. Bingham, 87 Tenn. 522, 11 S. W. Rep. 705; Hussner v. Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. Rep. 1002; Wager v. Troy Union R. Co., 25 N. Y. 526; Stanley v. Davenport, 54 Iowa, 463, 37 Am. Rep. 216. See also § 516.

² Williams v. Street R. Co., 41 Fed. Rep. 556.

³ Howe v. West End St. Ry. Co., 167 Mass. 46, 50.

Kentucky: Louisville Bagging Manuf. Co. v. Central Pass. R. Co., 95 Ky. 50.

Maryland: Green v. City & Suburban

To like effect, in a recent case in New Jersey, Vice-Chancellor Van Fleet said: "The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is the easement only which is appropriated, and no right of the owner is interfered with. While the street is preserved as a common public highway, the use of it does not belong to the owner of the land abutting on it any more than it does to any other individual of the community. The Legislature, therefore, does not, by permitting a railroad company to use the highway in common with the public, take away from the landowner anything that belongs to him. It is not a misappropriation of the way. It is used, in addition to the ordinary mode, in an improved mode for the people to pass and repass. This exposition of the law, so far as it concerns horse railroads, has been approved as correct in all subsequent cases. As I understand the adjudications of this State, this principle must be considered authoritatively established, that any use of a street which is limited to an exercise of the right of public passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not tend, in any substantial respect, to destroy the street as a means of free passage, common to all the people, is perfectly legitimate. Such use invades no right of the abutting owners; it takes nothing from them which the

R. Co., 78 Md. 294, 28 Atl. Rep. 626;
Koch v. North Avenue R. Co., 75 Md.
222, 23 Atl. Rep. 463, 15 L. R. A. 377.

Michigan: Detroit City R. Co. v.
Mills, 85 Mich. 634, 48 N. W. Rep. 1007;
Nichols v. Ann Arbor & Y. St. R. Co.,
87 Mich. 361, 49 N. W. Rep. 538, 16 L.
R. A. 371; Dean v. Ann Arbor St. R.
Co., 93 Mich. 330, 53 N. W. Rep. 396.

New Jersey: Paterson R. Co. v.
Grundy, 51 N. J. Eq. 213, 26 Atl. Rep.
788; Halsey v. Rapid Transit R. Co.,
47 N. J. Eq. 380, 20 Atl. Rep. 859; Ken-
nelly v. Jersey City (N. J.) 30 Atl. Rep.
531; West Jersey R. Co. v. Camden G.
& W. Ry. Co., 52 N. J. Eq. 31, 29 Atl.
Rep. 423.

New York: Hudson River Tel. Co. v.
Watervliet Turnp. & R. Co., 135 N. Y.,
393, 407, 32 N. E. Rep. 148.

Ohio: Mount Adams & Eden Park
Inc. R. Co. v. Winslow, 3 Ohio C. Ct.

425, reversing 20 W. Bull. 420; Pelton
v. East Cleveland R. Co., 22 Weekly
Bul. 67.

Pennsylvania: Rafferty v. Central
Trac. Co., 147 Pa. St. 579, 23 Atl. Rep.
884; Pennsylvania R. Co. v. Braddock
Electric R. Co., 1 Pa. Dist. Rep. 626;
Lockhart v. Street R. Co., 139 Pa. St.
419, 21 Atl. Rep. 26; Commonwealth
v. West Chester, 9 Pa. Co. Ct. 542.

Rhode Island: Taggart v. Newport
Street R. Co., 16 R. I. 668, 7 L. R. A.
205, 19 Atl. Rep. 326, 7 Ry. & Corp.
L. J. 385, 2 Am. R. & Corp. Rep. 44,
43 Am. & Eng. R. Cas. 208.

Tennessee: Cumberland T. & T. Co.
v. United Elec. R. Co., 93 Tenn. 492,
27 L. R. A. 236, 29 S. W. Rep. 104, 10
Am. R. & Corp. Rep. 549.

Texas: San Antonio Rap. Tr. St. R.
Co. v. Limburger, 88 Tex. 79.

law reserved to the original proprietor when his land was taken; it is simply a user of a right already fully vested in the public, and consequently, by its exercise, nothing is taken from the abutting owners which can be made the basis of additional compensation.”¹

Even the placing of poles in the middle of the street, for the purpose of using electricity for street car propulsion, does not impose a new servitude on the land in the street, for the poles facilitate the use of the street as a public way.²

504. The use of a street for the operation of an electric railroad is subject to the construction that such use shall not prevent the use of the street for usual street purposes. Regard must be had to the width and condition of the street. In a case in which it was objected that the street was too narrow to permit the passage of carriages when the street cars were on the track, the court said: “Under this record we can only announce some general principles, leaving the defendants without prejudice to pursue such remedy as they may have when they can establish a violation of their legal rights. 1. The complainant cannot lawfully construct and operate its road in a street too narrow to admit the passage of its cars and other vehicles at the same time, nor so construct it as to interfere with the rights of the general public in the street.³ 2. Nor in a street, though of sufficient width, if its condition be such that the operation of the railway will result in the practical exclusion of others from the use of the street. A railway so constructed and operated would be a public nuisance and the courts would abate it. 3. The complainant’s roadbed and track must be built substantially with the level of the street, so as to permit vehicles to cross without difficulty. 4. The poles must be so placed as not to interfere with the right of ingress and egress to abutting property.”⁴

505. A long line of electric railroad traversing country roads is an additional servitude according to the decisions of the Pennsylvania courts, on the ground that the township authorities have no power, under existing legislation in that State, to impose such

¹ Halsey v. Rapid Transit St. R. Co., Side St. R. Co., 48 Mich. 433, 12 N. W. 47 N. J. Eq. 380, 384, 20 Atl. Rep. 859, Rep. 643.
per Van Fleet, V. C.

² Halsey v. Rapid Transit St. R. Co., Mich. 634, 658, 48 N. W. Rep. 1007, 47 N. J. Eq. 380, 20 Atl. Rep. 859.
per Grant, J. See also Nichols v. Ann

³ Grand Rapids St. R. Co. v. West Arbor & Y. R. Co., 87 Mich. 361, 49 N. W. Rep. 538, 16 L. R. A. 371.

additional servitude without the consent of the abutting landowners. "The consent of township authorities justifies an entry upon the public road so far as the public is concerned, but the supervisors of the townships have no power to bind private property or subject it to a servitude for the benefit of any person or corporation other than the township and the public it represents. The carriage of passengers through the township on their journey from one city or borough to another by rail is in no sense a township purpose; and whether these passengers make their journey in cars drawn by a locomotive over a steam railroad, or in those propelled by electricity over tracks laid upon the highways, is immaterial both to taxpayers and to landowners along the route traveled, except as the adoption of one or the other of these modes of transportation may affect the township roads or the private property of citizens. When the supervisors give their consent to the occupation of the township roads by a street railway, they speak as the representatives of those who build and those who use the roads, but not as the representatives of the private property over which the roads pass. The street railway companies cannot reach the property owners either through the local authorities or by the right of eminent domain, as the law now stands; and it is not easy to see how such a company can protect itself in the use of country roads except by contract with every owner of property along the roads they wish to occupy."¹

VIII. *Elevated and Steam Railroads in Highways.*

506. The use of streets for the erection and operation of an elevated railroad is a use of them not sanctioned by their obvious purpose, or by usage; it is a use which constitutes a taking and appropriation of the easement of abutting owners by the railroad company erecting and operating such railroad, rendering it liable to the abutters for damages occasioned thereby.² The elements of

¹ *Pennsylvania R. Co. v. Montgomery County P. R. Co.*, 167 Pa. St. 62, 70, per Williams, J. See as to the distinction between urban and country highways, as to the imposition of additional servitudes, *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. Rep. 105, 56 Am. Rep. 246; *Bloomfield & R. Nat. Gas-light Co. v. Calkins*, 62 N. Y. 386.

² *Story v. N. Y. Elevated R. Co.*, 90

N. Y. 122, 43 Am Rep. 146; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528; *Pond v. Metropolitan El. R. Co.*, 112 N. Y. 186, 19 N. E. Rep. 487; *New York Nat. Bank v. Metropolitan El. R. Co.*, 108 N. Y. 660, 15 N. E. Rep. 445; *American Bank Note Co. v. New York El. R. Co.*, 13 N. Y. Supp. 626; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157, 12 N. E. Rep. 568;

light and air are both to be derived from the space over the land on the surface of which the streets are constructed, and which are made servient for that purpose. The abutting owners have, therefore, an interest in the land, and when it is sought to cut off or interrupt the light and air by a structure above the surface of the street, such owners are entitled to compensation.¹

In Pennsylvania, prior to the adoption of the new Constitution of 1874, the courts asserted the supreme power of the Legislature to appropriate streets to public uses destructive of their ordinary use as public ways, and denied the right of abutting owners to compensation for any injury to their property occasioned by such appropriation. The new Constitution, however, declared that municipal and other corporations invested with the privilege of taking private property for public use should make compensation for property so taken, injured or destroyed. Under this provision an abutting owner may recover for damages to his property caused by the construction of an elevated road in the street in front of his premises which obstructed his access to his property and impaired its value.²

507. The decision in the Story Case was of limited application because it rested in large part upon a covenant in a deed of the abutting land from the city that the streets opposite this land "shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for the inhabitants of the said city." In the Lahr Case, the street upon which elevated road in question was built, was, in common with most of the streets of the city of New York, laid out under the statute of 1813, by the terms of which the fee of lands taken for a street vested in the city "in trust, nevertheless, that the same be appropriated and kept open for or as a part of a public street." The court said: "We are of the opinion that no legal difference exists, with reference to the interest acquired by abutting owners in a public street, between that afforded by a title conferred under such a deed as Story had, or that acquired through a series of mesne conveyances from the original owner, whose property had been taken by proceedings *in*

In re Split Rock Cable Road Co., 34, N. Y. St. 169; Hughes v. Met. El. R. Co., 130 N. Y. 14, 28 N. E. Rep. 765.

¹ Mattlage v. New York Elev. R. Co., 33 N. Y. St. Rep. 918.

² Pennsylvania R. Co. v. Duncan, 111

Pa. St. 352, 5 Atl. Rep. 742. For cases prior to the new Constitution, see Black v. Phila. & Read. R. Co., 58 Pa. St. 249; Snyder v. Penn. R. Co., 55 Pa. St. 340; Danville H. & W. R. Co. v. Com., 73 Pa. St. 29.

invitum instituted by the municipality, under a public statute, to acquire land for street purposes. * * * An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising the fund necessary to defray the cost of constructing the street. He is, therefore, compelled to pay for them at their full value, and if, in the next instant, they may, by legislative authority, be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any form of acquiring property.”¹

508. In later cases the same construction was applied where land had been conveyed to the city for street purposes. The terms of the grant in such cases gave the abutting owners an easement in the streets, or the grant was subject to a condition that such street should be kept open forever as a street. Such easement became at once appurtenant to the abutting land and formed a permanent part of the owner's estate in it. “The lot became the dominant, and the open way or street the servient tenement.”²

Still later it was held that an abutting owner has an easement or property right in a street merely by virtue of the proximity of his land to the street. The city of New York owns the fee of the lands occupied by the streets of that city, whether laid out under the Dutch regime, during the colonial period, or after the organization of the State government, but its tenure is in trust for street uses. The trust so created is not only for the benefit of the public at large, but for the special benefit of abutting owners, and it is to be presumed that upon faith that the streets shall be forever kept open, such owners have acted in improving and building on their adjoining land. The Legislature has no power to abrogate this

¹ *Lahr v. Met. El. R. Co.*, 104 N. Y. Met. El. R. Co., 108 N. Y. 660, 15 N. 268, 289, 291, 10 N. E. Rep. 528, per E. Rep. 445; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 25 N. E. Rep. 496, *Ruger, Ch. J.*

² *Glover v. Manhattan R. Co.*, 19 J. & 22 J. & S. 417.
S. 1, 14; *New York Nat. Ex. Bk. v.*

trust or authorize its violation by devoting a street to other and inconsistent purposes, without making compensation to abutting owners. Mr. Justice Andrews, delivering the opinion of the court, said: "The main question presented on this appeal is difficult of solution. There must be a property right in the street to authorize the maintenance of the action. The plaintiff's easements, or rights in the nature of easements, are not created by grant or covenant. It is easier to realize the existence of these rights than to trace their origin. They arise, we think, from the situation, the course of legislation, the trust created by the statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street and shall not be diverted to other and inconsistent uses. There is some analogy, we think, between the rights of abutting owners as against the public, and those acquired by the public against private persons in streets or highways by dedication. The public acquires, upon acceptance of a dedication by the owner of land of a highway over the same, a perpetual easement therein for a highway, although there may be no deed, or writing, or covenant, and no formalities attending the transaction, such as is required for the creation of an easement at common law. The State has dedicated the streets in the city of New York to be public streets. The abutting owners have acted upon the dedication and upon the pledge of the public faith that they shall continue to be open public streets forever. It would be gross injustice to deprive them of the advantages intended, without compensation. The dedication ought to be, and is, we think, irrevocable."¹

These views are fully confirmed in *Bohm's Case*, recently decided by the Court of Appeals of New York, Mr. Justice Peckham saying: "It has now been decided that, although the land itself was not taken, yet the abutting owner, by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street. These rights of obtaining for the adjacent lands facilities of light, etc., were called easements, and were held to be appurtenant to the land which fronted on the public street. These easements were decided to be property, and protected by the Constitution from being taken without just compensation. It was held that the

¹ *Kane v. New York El. R. Co.*, 125 N. Y. 164, 185, 26 N. E. Rep. 278.

defendants, by the erection of their structure and the operation of their trains, interfered with the beneficial enjoyment of these easements by the adjacent landowner and in law took a portion of them. By this mode of reasoning, the difficulty of regarding the whole damage done to the adjacent owner as consequential only, because none of his property was taken, and, therefore, not collectible from the defendants, was overcome. The interference with these easements became a taking of them *pro tanto*, and their value was to be paid for, and in addition the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which owners sustained from the building and operation of the defendant's road. For the purpose of permitting such a recovery, the taking of property had to be shown. The cases of Story, Lahr, Drucker, Abendroth and Kane finally and completely settled these matters."¹

509. The street easements of an abutting owner appurtenant to an estate fronting on one street extend to the entire estate, though that also abuts upon another street. In an action to recover damages for injuries to premises caused by the construction and maintenance of an elevated railroad on a street in front thereof, it appeared that the premises in question extended from said street to another street in the rear, and were covered by a single brick building. Formerly it consisted of two lots, having different owners; they were conveyed to one person before the road was authorized to be built, and since then have been conveyed and occupied as one lot. There was no evidence that portions of the premises fronting on each street were occupied separately. It was held that plaintiff was, as abutting owner, entitled to recover his damages for injuries to the whole premises considered as a single lot, that while the fact that the premises were accessible to persons, property, light and air from both streets was important as bearing on the extent of the injuries, it did not preclude the recovery of any damages for injuries to that portion on another street.²

In case a lot of land fronting on two streets is severed by a sale of a portion fronting on one of the streets, the street rights are also

¹ Bohm v. Met. El. R. Co., 129 N. Y. 576, 587, 29 N. E. Rep. 802, per Peckham, J.

² Stevens v. New York El. R. Co., 130 N. Y. 95, 28 N. E. Rep. 667; Bischoff v. New York El. R. Co., 138 N. Y. 257, 33 N. E. Rep. 1073, 18 N. Y. Supp. 865; Mooney v. New York El. R. Co., 30 N. Y. St. Rep. 561, 9 N. Y. Supp. 522.

severed, and the grantor, while the severance continues, can recover no damages as appurtenant to the part sold for an interference with his easements in the street upon which his remaining land abuts. It has been held that if the two lots be reunited and a single building be erected over both, that the owner does not acquire an easement in one street as appurtenant to the entire premises.¹ This conclusion cannot be supported. Clearly if an elevated railroad be built upon one of the streets upon which such building fronts, the owner is entitled to recover damages for injuries thereby occasioned to the entire building and premises.²

510. The measure of damages for the obstruction of a street by an elevated railroad is the lessened value of the property caused by the construction and continued operation of the road, though the value of the property for the owner's own use may not have been impaired.³ The general benefits accruing to the property from the construction of the road are therefore to be deducted from the consequential damages.⁴ The general benefits, as well as those peculiar to the property, are to be considered, and only the amount of damages over and above benefits can be recovered.⁵

The value of the property before and after the appropriation of the street for railroad purposes may be shown by expert evidence. But such evidence is not admissible to show what would have been the value of the property if the railroad had not been built.⁶

¹ *Greenwood v. Met. El. R. Co.*, 26 J. & S. 482.

² *Stevens v. New York El. R. Co.*, 130 N. Y. 95, 28 N. E. Rep. 667.

³ See § 525; *Woolsey v. New York El. R. Co.*, 134 N. Y. 323, 30 N. E. Rep. 387, 31 N. E. Rep. 891, 31 N. Y. St. Rep. 91; *Rumsey v. New York & N. E. R. Co.*, 133 N. Y. 79, 30 N. E. Rep. 654, 136 N. Y. 543, 32 N. E. Rep. 979; *Sperb v. Metropolitan El. R. Co.*, 137 N. Y. 155, 32 N. E. Rep. 1050, 20 L. R. A. 752; *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 119, 124, 23 N. E. Rep. 1134; *Mortimer v. Manhattan R. Co.*, 29 N. Y. St. Rep. 262, 8 N. Y. Supp. 536; *Korn v. N. Y. El. R. Co.*, 15 N. Y. Supp. 10.

⁴ *Saxton v. New York El. R. Co.*, 139 N. Y. 320, 34 N. E. Rep. 728; *Sutro v.*

Manhattan R. Co., 137 N. Y. 592, 33 N. E. Rep. 334; *Sperb v. Met. El. R. Co.*, 137 N. Y. 596, 33 N. E. Rep. 319; *Bischoff v. N. Y. El. R. Co.*, 138 N. Y. 257, 33 N. E. Rep. 1073; *Bohm v. Met. El. R. Co.*, 129 N. Y. 576, 29 N. E. Rep. 802; *Becker v. Met. El. R. Co.*, 131 N. Y. 509, 30 N. E. Rep. 499; *Newman v. Met. El. R. Co.*, 118 N. Y. 618, 23 N. E. Rep. 901; *Huggins v. Manhattan R. Co.*, 1 Misc. (N. Y.) 110; *Nette v. New York El. R. Co.*, 1 Misc. (N. Y.) 342; *Bookman v. New York El. R. Co.*, 137 N. Y. 302, 33 N. E. Rep. 333.

⁵ *Saxton v. New York El. R. Co.*, 139 N. Y. 320, 34 N. E. Rep. 728; *Sixth Ave. R. Co. v. Met. El. R. Co.*, 138 N. Y. 548, 34 N. E. Rep. 400.

⁶ *Sixth Avenue R. Co. v. Met. El. R. Co.*, 138 N. Y. 548, 34 N. E. Rep. 400;

If the benefits accruing to the property of an abutting owner from the construction of an elevated road in the street equal or exceed the damages consequent from the construction of the road, no damages can be recovered.¹

511. Only the easements of light, air and access are to be considered in ascertaining the future damages to the land of an abutting owner from the appropriation of the street for railroad purposes, though in ascertaining past damages the question of noise may be considered,² as also some other matters.

A release by an abutting owner to an elevated railroad company, of his easements or property rights appurtenant to his land taken by the operation of the road, includes easements of light, air, and access afforded by the street in front of the premises.³ Such release need not be recorded as against a subsequent purchaser of the land. The operation of the road is an open possession of the easements appurtenant to the abutting lots and puts the purchaser on inquiry.⁴

512. The loss of privacy may be taken into consideration in estimating past damages resulting from the operation of an elevated railroad in a street opposite the owner's house, which is so situated that the passengers and employees of the road look into the windows while standing on the station platform and descending the stairs to the street. "No reason appears why the defendants should not be responsible for the consequences of the loss of privacy

Hunter v. Manhattan R. Co., 141 N. Y. 281, 36 N. E. Rep. 400; New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 S. Ct. Rep. 743.

¹ Bookman v. New York El. R. Co., 147 N. Y. 298, 41 N. E. Rep. 705, 49 Am. St. Rep. 664; Malcolm v. New York El. R. Co., 147 N. Y. 308, 41 N. E. Rep. 790; Bohm v. Metropolitan El. R. Co., 129 N. Y. 576, 29 N. E. Rep. 802.

² Bischoff v. New York El. R. Co., 138 N. Y. 257, 33 N. E. Rep. 1073, American Bank Note Co. v. New York El. R. Co., 129 N. Y. 252, 29 N. E. Rep. 302; Storck v. Met. El. R. Co., 131 N. Y. 514, 30 N. E. Rep. 497; Becker v. Met. El. R. Co., 131 N. Y. 509, 30 N. E. Rep. 499; Bohm v. Met. El. R. Co., 129 N. Y. 576, 29 N. E. Rep. 802, 14 L. R. A. 344; Stevens v. N. Y. El. R., 130

N. Y. 95, 28 N. E. Rep. 667; Messenger v. M. R. Co., 129 N. Y. 502, 29 N. E. Rep. 955; Lamm v. Chicago, St. P. M. & O. Ry. Co., 45 Minn. 71, 47 N. W. Rep. 455. See §§ 526, 527.

³ Ward v. Met. El. R. Co. (N. Y.) 46 N. E. Rep. 319, affirming 31 N. Y. Supp. 527; White v. Manhattan R. Co., 139 N. Y. 19, 34 N. E. Rep. 887; Foote v. Met. El. R. Co., 147 N. Y. 367, 42 N. E. Rep. 181.

⁴ Mitchell v. Met. El. R. Co., 134 N. Y. 11, 31 N. E. Rep. 260; Phelan v. Brady, 119 N. Y. 587, 23 N. E. Rep. 1109; Page v. Waring, 76 N. Y. 463; Brown v. Volkening, 64 N. Y. 76; Holland v. Brown, 140 N. Y. 344, 35 N. E. Rep. 577; Ward v. Met. El. R. Co. (N. Y.), 46 N. E. Rep. 319.

thus occasioned so far as it depreciated the rental value of the rooms in the plaintiff's building. Those consequences detrimental to the rooms are the rational result of the maintenance of the road and the station, and are reasonably attributable to that cause."¹

It seems also that the obscurement of view of one's building is an element of damages which may be taken into account. Evidence showing that an elevated railroad and the structures connected therewith, intercepted the view of the plaintiff's premises by persons passing on the other side of the avenue, is competent as bearing upon their rental value.²

Damages may be recovered for the construction of an elevated road and station-house in front of the plaintiff's building, for the discomforts and inconveniences suffered in the occupation of the building, caused by the erection of such structures, independently of the running of trains.³

513. An abutting owner who acquired title after a railroad was built may recover damages for an interference with his easement of light, air and access. This easement is an incident of the fee and passes with it to successive grantees of the realty.⁴ This rule was applied in one case when the executors of a former owner had obtained and had been paid a judgment for the entire permanent damage, under the erroneous supposition that the executors had the legal title to such property.⁵

The owner of the fee may maintain an action for the damages sustained from the construction of an elevated road, although he has leased the premises, and therefore has not the immediate possession. The injury is to the inheritance.⁶

But it is held that an abutting owner who purchased the property

¹ Moore v. New York El. R. Co., 130 N. Y. 523, 528, 29 N. E. Rep. 997, per Bradley, J.; Kane v. New York El. R. Co., 125 N. Y. 164, 26 N. E. Rep. 278.

² Messenger v. Manhattan R. Co., 129 N. Y. 502, 29 N. E. Rep. 955.

³ New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 S. Ct. Rep. 743.

⁴ Werfelman v. Manhattan R. Co., 32 N. Y. St. 682, 11 N. Y. Supp. 66, 68; Glover v. Manhattan R. Co., 19 J. & S. 1; American Bank Note Co. v. New

York El. R. Co., 13 N. Y. Supp. 626; Beach v. Wilmington & W.R.Co.(N. C.) 26 S. E. Rep. 703.

⁵ Mitchell v. Metropolitan El. R. Co., 9 N. Y. Supp. 829, 31 N. Y. St. 625.

⁶ Mortimer v. Man. R. Co., 129 N. Y. 81, 29 N. E. Rep. 5; Kearney v. Met. El. R. Co., 129 N. Y. 76, 29 N. E. Rep. 70; Hine v. N. Y. El. R. Co., 128 N. Y. 571, 29 N. E. Rep. 69; Kernochan v. N. Y. El. R. Co., 128 N. Y. 559, 29 N. E. Rep. 65, 14 L. R. A. 673.

after the construction of a railroad in the street cannot maintain an action of trespass *quare clausum fregit* for the construction of the railroad before the conveyance, as such cause of action is not assignable, and does not pass with the land. In such case it is presumed that the grantee has been compensated in the reduced price at which he purchased the land on account of the permanent location and proximity of the railroad. The building of a second track by the railroad company, after the conveyance, is not a new breaking of the close, for which the owner can maintain trespass.¹

514. An injunction will be granted to prevent the construction and operation of an elevated railroad until damages have been ascertained and paid to the abutting owner in case the company has failed to obtain from him the right of way.²

Such owner is not deprived of his right to redress, as on the ground of acquiescence, by merely failing to interfere to prevent the erection of the railway and its subsequent use. Nor is he deprived of his right to redress by erecting an awning extending from his buildings to the railroad structure, especially where the railroad materially interferes with the light and air to the stories above the awning. Such action does not constitute an abandonment of the easements, and at most entitles the railroad company to the value of the support of the awning by its structures.³

515. Whether the construction and the operation of a steam railroad on the surface of a street is an unauthorized use of it which entitles the abutting owners to recover damages, is a question upon which the courts are not wholly agreed. Doubtless the use of a street for a street railway operated by horses, by cable, or by electricity, for the carrying of passengers, is sanctioned by the obvious purpose of the street and by usage. But a different question arises when a street is used for the tracks of an ordinary commercial railroad operated by steam engines; and the better opinion is that abutting owners are entitled to damages for the injuries caused by reason of ashes, smoke, and cinders, made by passing engines, and by the noises and jarring of passing trains. Undoubtedly the Legis-

¹ Galt v. Chicago & N. W. R. Co., 157 Ill. 125, 41 N. E. Rep. 643.

² Thompson v. Manhattan R. Co., 130 N. Y. 360, 29 N. E. Rep. 264; Galway v. Met. El. R. Co., 128 N. Y. 132, 28 N. E. Rep. 479, 13 L. R. A. 788; Pappen-

heim v. Met. El. R. Co., 128 N. Y. 436, 28 N. E. Rep. 518, 13 L. R. A. 401, 26 Am. St. Rep. 486.

³ Matlage v. New York El. R. Co., 11 N. Y. Supp. 482.

lature may, so far as the public is concerned, authorize the construction of such a road in a public street; but if such a use of the streets is an unauthorized one as regards abutting owners, who have easements of way in the street, they are entitled to damages for the interference with their rights. "For if the abutting owner, independently of the ownership of the fee in the street, has an easement in the street in front of his lot to the full width of it for the purposes of access, light and air, which is property and cannot be taken from him without compensation, it is difficult for us to see what difference it makes whether the easement is taken away, or its enjoyment interfered with by a railroad constructed and operated on the surface of the ground, or at an elevation above it."¹ Accordingly it is held quite generally that the construction and operation of an ordinary and commercial railroad on a street or highway, the fee of which is in the abutting owners, is a perversion of it to a use for which it was not intended; and as it materially interferes with his enjoyment of his easement in the street, it is a taking of his property for the public use within the meaning of the Constitution.²

¹ *Lamm v. Chicago, St. Paul, M. & O. Ry. Co.*, 45 Minn. 71, 79, 47 N. W. Rep. 455, 46 Am. & Eng. R. Cas. 42, per Mitchell, J. See § 528.

² *Railroad Co. v. Schurmeier*, 7 Wall. 272; *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 S. Ct. 1009.

Alabama: *Western R. Co. v. Ala. Grand Trunk R. Co.*, 96 Ala. 272, 17 L. R. A. 474, 11 So. Rep. 483; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190, 3 So. Rep. 23; *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740.

Arkansas: *Reichert v. St. Louis & S. F. R. Co.*, 51 Ark. 491, 11 S. W. Rep. 696, 38 Am. & Eng. R. Cas. 453.

California: *Weyl v. Sonoma Valley, R. Co.*, 69 Cal. 202, 10 Pac. Rep. 510; *Muller v. So. Pac. B. R. Co.*, 83 Cal. 240, 23 Pac. Rep. 265; *Southern Pac. R. Co. v. Reed*, 41 Cal. 256; *North Beach & M. R. Co.'s Appeal*, 32 Cal. 499. See, however, 523. *Montgomery v. Santa Ana W. R. Co.*, 104 Cal. 186.

Colorado: *Denver v. Bayer*, 7 Colo. 113, 2 Pac. Rep. 6, 2 Am. & Eng. Corp.

Cas. 465; *Denver & R. G. Ry. Co. v. Bourne*, 11 Colo. 59, 16 Pac. Rep. 839; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. Rep. 777.

Connecticut: *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74, 85, 56 Am. Dec. 390; *Elliott v. Fairhaven & W. R. Co.*, 32 Conn. 579.

Florida: *Florida So. R. Co. v. Brown*, 23 Fla. 104, 1 So. Rep. 512.

Georgia: *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Daly v. Georgia, S. & F. R. Co.*, 80 Ga. 793, 7 S. E. Rep. 146, 12 Am. St. Rep. 286. Earlier cases to the contrary, *Savannah A. & G. R. Co. v. Shiels*, 33 Ga. 601; *Roll v. Augusta*, 34 Ga. 326, overruled.

Illinois: *Indianapolis B. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Chicago, B. & Q. R. Co., v. McGinnis*, 79 Ill. 269; *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74; *Rigney v. Chicago*, 102 Ill. 64; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Chicago v. McDonough*, 112 Ill. 85; *Galt v. Chicago*

516. A steam railroad operated in a street is held to add a new servitude, because it prevents the use of the street in the usual manner, and the owner of the fee is entitled to additional compen-

& N. W. R. Co., 157 Ill. 125, 41 N. E. Rep. 643.

Indiana: Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; White v. Chicago, St. L. & P. R. Co., 122 Ind. 317, 23 N. E. Rep. 782, 7 L. R. A. 257; Burkam v. Ohio & M. R. Co., 122 Ind. 344, 23 N. E. Rep. 799.

Iowa: 1 Iowa R. S. 1888, § 623; Code, § 464; Merchants' U. Barb Wire Co. v. Chic. B. & Q. R. Co., 70 Iowa, 105, 28 N. W. Rep. 494; Ewell v. Greenwood, 26 Iowa, 377; Kucheman v. Chicago, C. & D. R. Co., 46 Iowa, 366; Stange v. Dubuque, 62 Iowa, 303, 17 N. W. Rep. 518; Enos v. Chicago, St. P. & K. R. Co., 78 Iowa, 28, 42 N. W. Rep. 575; Cook v. Chicago, M. & St. P. R. Co., 83 Iowa, 278, 49 N. W. Rep. 92; Nicks v. Chicago, St. P. & K. C. R. Co., 84 Iowa, 27, 50 N. W. Rep. 222.

Kansas: Chicago, K. & W. R. Co. v. Woodward, 47 Kan. 191, 27 Pac. Rep. 836; Erving v. Phelps & B. Wind Mill Co., 52 Kan. 787, 35 Pac. Rep. 800; Central Branch U. Pac. R. Co. v. Andrews, 30 Kan. 590, 2 Pac. Rep. 677; Atchison, T. & S. F. R. Co. v. Davidson, 52 Kan. 739, 35 Pac. Rep. 787; Mikesell v. Durkee, 34 Kan. 509, 9 Pac. Rep. 278; Leavenworth, N. & S. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. Rep. 297. See § 123.

Kentucky: Henderson Belt R. Co. v. Dechamp (Ky.) 24 S. W. Rep. 605; Stickley v. Chesapeake & O. R. Co. (Ky.) 20 S. W. Rep. 261, 52 Am. & Eng. R. Cas. 56; Fulton v. Short Route R. T. R. Co., 85 Ky. 640, 4 S. W. Rep. 332, 7 Am. St. Rep. 619. See §§ 521, 523.

Louisiana: Bradley v. Pharr, 45 La. Ann. 426, 12 So. Rep. 618.

Maryland: Phipps v. West Maryland R. Co., 66 Md. 319, 7 Atl. Rep. 556; White v. Flannigan, 1 Md. 525, 54 Am. Dec. 668.

Massachusetts: Onset R. Co. v. County Commissioners, 154 Mass. 395, 28 N. E. Rep. 286; Springfield v. Connecticut River R. Co., 4 Cush. 63, 71.

Michigan: Nichols v. Ann Arbor & Y. St. R. Co., 87 Mich. 361, 49 N. W. Rep. 538, 16 L. R. A. 371; Grand Rapids, & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Taylor v. Bay City St. R. Co., 101 Mich. 140, 59 N. W. Rep. 447, 80 Mich. 77, 45 N. W. Rep. 335.

Minnesota: Gustafson v. Hamm, 56 Minn. 334, 57 N. W. Rep. 1054, 22 L. R. A. 565; Adams v. Chic. B. & N. R. Co., 39 Minn. 286, 39 N. W. Rep. 629, 12 Am. St. Rep. 644; Carli v. Stillwater Street R. Co., 28 Minn. 373, 10 N. W. Rep. 205, 41 Am. Rep. 290; Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215; Morrell v. Chicago, M. & St. P. R. Co., 49 Minn. 526, 52 N. W. Rep. 440; Schurmeier v. St. Paul & P. R. Co., 10 Minn. 82, 88 Am. Dec. 59; Hartz v. St. Paul & S. C. R. Co., 21 Minn. 358.

Mississippi: Alabama & V. R. Co. v. Bloom, 71 Miss. 247, 15 So. Rep. 72; Theobald v. Louisville, N. O. & T. R. Co., 66 Miss. 279, 14 Am. St. Rep. 564.

Missouri: St. Louis Transfer Co. v. St. Louis Merchants' Bridge Co., 111 Mo. 666, 20 S. W. Rep. 319. See § 523.

Nebraska: Omaha & N. P. R. Co. v. Janeczek, 30 Neb. 276, 46 N. W. Rep. 478, 27 Am. St. Rep. 399; Burlington & M. R. Co. v. Reinhackle, 15 Neb. 279, 18 N. E. Rep. 69, 48 Am. Rep. 342; Omaha & R. V. R. Co. v. Rogers, 16 Neb. 117, 19 N. W. Rep. 603, 20 Am. & Eng. R. Cas. 79; Hastings & G. I. R. Co. v. Ingalls, 15 Neb. 123, 16 N. W. Rep. 762.

New Jersey: Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43, 2 Atl. Rep. 775; Starr v. Camden & A. R. Co., 24 N. J. L. 592; Pennsylvania R. Co. v. Thompson, 45 N. J.

sation for such use.¹ But a steam railroad in a street operated so as to be compatible with the usual modes of use, has been held not to impose a new servitude.² "The difference," says Judge Cald-

Eq. 870, 19 Atl. Rep. 622; Hinchman v. Paterson H. R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; Jersey City & Bergen R. Co. v. Jersey City & H. H. Co., 20 N. J. Eq. 61, 66; Citizens' Coach Co. v. Camden H. R. Co., 33 N. J. Eq. 267, 274. An opinion to the contrary, expressed by Williamson, Ch., in Morris & E. R. Co. v. Newark, 10 N. J. Eq. 352, was overruled in subsequent cases.

New York: Williams v. New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651, Wager v. Troy Union R. Co., 25 N. Y. 526; Henderson v. New York Cent. R. Co., 78 N. Y. 423; Fanning v. Osborne, 34 Hun, 121; Carpenter v. Oswego & S. R. Co., 24 N. Y. 655; Mahon v. New York Cent. R. Co., 24 N. Y. 658; Heath v. Barman, 49 Barb. 496; New York & H. River R. Co. v. New York, 1 Hilt. 562; Kelsey v. King, 33 How. Pr. 39; *In re* New York Cent. & H. R. Co., 15 Hun, 63; Knox v. New York, 55 Barb. 404, 411; Brooklyn City R. Co. v. Coney Isl. R. Co., 35 Barb. 364; People v. Kerr, 27 N. Y. 188, 204.

North Carolina: White v. North Western N. C. R. Co., 113 N. C. 610, 18 S. E. Rep. 330.

Ohio: Lawrence Railroad Co. v. Williams, 35 Ohio St. 168; Railway Company v. Laurence, 38 Ohio St. 41, 43 Am. Rep. 419; Parrot v. Cincinnati, etc., R. Co., 10 Ohio St. 624; Cincinnati R. Co. v. Cummins ville, 14 Ohio St. 523.

Oregon: See § 523.

Pennsylvania: Pennsylvania R. Co. v. Duncan, 111 Pa. St. 352, 354, 5 Atl. Rep. 742, 2 Cent. Rep. 551; Commonwealth v. Allen, 148 Pa. St. 358, 23 Atl. Rep. 1115, 16 L. R. A. 148; Phillips v. Dunkirk W. & P. R. Co., 78 Pa. St. 177; Pennsylvania S. V. R. Co. v. Walsh, 124 Pa. St. 544, 17 Atl. Rep. 186; Pennsylvania S. V. R. Co.

v. Zeimer, 124 Pa. St. 560, 17 Atl. Rep. 187; Jones v. Erie & W. Val. R. Co., 151 Pa. St. 30, 17 L. R. A. 758, 25 Atl. Rep. 134, 31 Am. St. Rep. 722, 6 Am. R. & C. R., 563.

Tennessee: Railroad Co. v. Bingham, 87 Tenn. 522, 11 S. W. Rep. 705; Street R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. Rep. 936, 9 L. R. A. 100, 17 Am. St. 933.

Texas: Gulf, C. & S. F. R. Co. v. Eddins, 60 Tex. 656.

Utah: Dooly Block v. Salt Lake R. T. Co., 9 Utah, 31, 33 Pac. Rep. 229.

Virginia: Hodges v. Seaboard & R. Co., 88 Va. 653, 14 S. E. Rep. 380, 16 Va. L. J. 109.

West Virginia: Stewart v. Ohio River, R. Co., 38 W. Va. 438, 18 S. E. Rep. 604; Spencer v. Point Pleasant & O. R. Co., 23 W. Va. 406.

Washington: Kaufman v. Tacoma, O. & G. H. R. Co., 11 Wash. 632, 40 Pac. Rep. 137; Hatch v. Tacoma, O. & G. H. R. Co., 6 Wash. 1, 32 Pac. Rep. 1063.

Wisconsin: Hanlin v. Chic. & N. W. R. Co., 61 Wis. 515, 21 N. W. Rep. 623; Carl v. Sheboygan & F. Du L. R. Co., 46 Wis. 625, 1 N. W. Rep. 295; Evans v. Chicago & St. P., M. & O. R. Co., 86 Wis. 597; Farrand v. Chicago & N. W. R. Co., 21 Wis. 435; Janesville v. Milwaukee & M. R. Co., 7 Wis. 484; Wilson v. Mineral Point, 39 Wis. 160; Taylor v. Chic., M. & St. P. R. Co., 83 Wis. 636, 53 N. W. Rep. 853; Ford v. Chicago & N. W. R. Co., 14 Wis. 609, 80 Am. Dec. 791.

¹ Citizens' Coach Co. v. Camden Horse R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542; Starr v. Camden & Atl. R. Co., 24 N. J. L. 592.

² Fulton v. Short Route Ry. Transfer Co., 85 Ky. 640, 4 S. W. Rep. 332, 7 Am. St. Rep. 619; Newell v. Minneap-

well, "between street railroads and railroads for general traffic is well understood. The difference consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers, from one part of a thickly populated district to another, in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers, — is a street railroad, whether the cars are propelled by animals or mechanical power. The propelling power of such a road may be animal, steam, electricity, cable, fireless engines, or compressed air; all of which motors have been, and are now, in use for the purpose of propelling street cars."¹

517. The right of recovery in such case is based upon the ground that there has been a taking of private property for the purposes of a railroad, to which are incident the inconvenience caused by interference with the easements of access, light and air, and as such inconveniences are necessarily incident to such use and property, they are proper elements of the damages that may be recovered.² "The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied, nor that the latter easement is enjoyed, not by the public at large, but by a corporation, because it will not be pretended that every man would have a right to go and lay down his timbers, and his iron rails, and make a railroad upon a highway. Here, then, are two easements; one vested in the public, the other in the railroad company. These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be

olis L. & M. R. Co., 35 Minn. 112, 27 N. W. Rep. 839; Wager v. Troy Union R. Co., 25 N. Y. 526; Carpenter v. Oswego & S. R. Co., 24 N. Y. 655; Mahon v. New York Cent. R. Co., 24 N. Y. 658; Williams v. New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651.

¹ Williams v. City Electric Ry. Co., 41 Fed. Rep. 556.

² Adams v. Chicago B. & N. R. Co., 39 Minn. 286, 39 N. W. Rep. 629, as interpreted in Lamm v. Chicago, St. P. M. & O. Ry. Co., 45 Minn. 71, 47 N. W. Rep. 455, 46 Am. & Eng. R. Cas. 42.

that it is carved out and is a part of the public easement, and is, therefore, the gift of the public. This would do, if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter, then, to have been consulted? * * * Any one can see that, to convert a common highway, running over a man's land, into a railroad, is to impose an additional burden upon the land, and greatly to impair its value."¹

But a mere change of grade in a highway is clearly distinguishable from the appropriation of the highway to another use, and the imposition of an additional servitude.²

518. If a railroad company obstructs a street abutting on one's land at a part of such street not opposite his land, but at a distance from it, he has no ground of action for any inconvenience he may suffer therefrom, unless access to his land is thereby cut off or materially interfered with.³

But if a railroad not touching one's land obstructs a street leading to it so as to cut off or materially interfere with his access to his land, this is an interference with his property for which an action lies.⁴

To entitle the abutting owner for an obstruction of the street it must appear that the obstruction complained of is a physical disturbance of his rights, such that the use of his property in the manner in which he had previously enjoyed it is impaired, and there is

¹ Williams v. New York Cent. R. Co., 16 N. Y. 97, 109, 69 Am. Dec. 651, per Selden, J

² Gilpin v. Ansonia (Conn.) 35 Atl. Rep. 777; Nicholson v. N. Y. & N. H. R. Co., 22 Conn. 85; Platt v. Milford, 66 Conn. 320, 335, 34 Atl. Rep. 82, 84.

³ Adams v. Chicago B. & N. R. Co., 39 Minn. 286, 39 N. W. Rep. 629, per Gilfillan, C. J., citing Shaubut v. St. Paul & Sioux City R. Co., 21 Minn. 502; Rochette v. Chicago, M. & St. P. Ry. Co., 32 Minn. 201; Barnum v. Minnesota Transfer Ry. Co., 33 Minn. 365, 23 N. W. Rep. 538; Bucholz v. New York, L. E. & W. R. Co., 66 Hun, 377, 21 N. Y. Supp. 503, 50 N. Y. St. 670; Buhl v. Fort St. U. D. Co., 98

Mich. 596, 57 N. W. Rep. 829; Rude v. St. Louis, 93 Mo. 408; State v. Elizabeth, 54 N. J. L. 462, 24 Atl. Rep. 495; Morgan v. Des Moines & St. L. R. Co., 64 Iowa, 589, 52 Am. Rep. 462, 21 N. W. Rep. 96. And see Stanwood v. Malden, 157 Mass. 17, 31 N. E. Rep. 702.

⁴ Brakken v. Minn. & St. L. Ry. Co., 29 Minn. 41, 11 N. W. Rep. 124; Brisbane v. St. Paul & Sioux City R. Co., 23 Minn. 114; Dantzer v. Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. Rep. 223, 50 Am. St. Rep. 343; Union Depot Co. v. Brunswick, 31 Minn. 297, 17 N. W. Rep. 626; Pennsylvania Co. v. Stanley, 10 Ind. App. 421, 37 N. E. Rep. 288.

a special damage to his property differing in kind from that suffered by the community in general, and not merely differing in degree.¹

If a lot of land does not abut upon the street obstructed, and the owner is only affected by an inconvenience in traveling to and from his premises, the inconvenience is one suffered alike by all the community, and the owner cannot recover damages.²

519. The laying of a railroad track upon a street is not an obstruction of the right of ingress and egress of one whose land does not abut upon the street, though it is very near to the street.³ But under a statute which provides that a railroad company which occupies a street of a city with its tracks shall be responsible for injuries thereby done to private property upon or near the street so occupied, the owner or lessee of property not actually abutting on the street may recover for such injuries.⁴

An abutting owner is entitled to recover damages for the construction of a railroad which cuts off his approach to his land through one end of the street, whether he owns the fee of the street or not.⁵

The obstruction need not be opposite to his property if it interferes with his access to it.⁶ He may recover for an injury to his land occasioned by an embankment rendered necessary in the construction of the roadbed of a railroad, though his land is not opposite to any portion of the track itself.⁷ His easement in the street, appurtenant to his land, is not limited to the space immediately in front of it.⁸

¹ *Indiana B. & W. R. Co. v. Eberle*, 110 Ind. 542, 11 N. E. Rep. 467; *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604, 39 N. E. Rep. 223, 50 Am. St. Rep. 343; *Leavenworth N. & S. R. Co. v. Curtan*, 51 Kans. 432, 33 Pac. Rep. 297.

² *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604, 39 N. E. Rep. 223, 50 Am. St. Rep. 343.

³ *Chesapeake & O. R. Co. v. Kobs* (Ky.) 30 S. W. Rep. 6; *Rauenstein v. New York, L. & W. R. Co.*, 136 N. Y. 528, 32 N. E. Rep. 1047, 18 L. R. A. 768.

⁴ Md. Code, art. 23, § 169, *Lake Roland El. Ry. Co. v. Webster*, 81 Md. 529, 32 Atl. Rep. 186.

⁵ *Pennsylvania R. Co. v. Stanley*, 10

Ind. App. 421, 37 N. E. Rep. 288; *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433, 21 N. E. Rep. 1002; *In re New York Elevated Co.*, 36 Hun, 427; *Rigney v. Chicago*, 102 Ill. 64; *Everett v. Marquette*, 53 Mich. 450, 19 N. W. Rep. 140; *Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. Rep. 761.

⁶ *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240, 51 N. W. Rep. 842, 33 Am. St. Rep. 637.

⁷ *Gates v. Chicago, St. P. & K. C. R. Co.*, 82 Iowa, 518, 48 N. W. Rep. 1040.

⁸ *Wilson v. New York El. R. Co.*, 30 N. Y. Supp. 547, 9 Misc. Rep. 657; *Galway v. Metrop. El. R. Co.*, 128 N. Y. 132, 28 N. E. Rep. 479, affirming 13 N. Y. Supp. 47; *Kearney v. Metrop. El.*

520. The construction of a railroad bridge over a highway imposes a new servitude on the land occupied by the public easement for which an abutting owner is entitled to compensation. "The mere proximity of the railroad so that the noise of passing trains could be heard, or the dust and smoke therefrom be noticeable, imposed no servitude. The only legal ground of complaint grows out of the overhanging of so much of the land to which the plaintiff has title as is occupied at the surface by the streets. This is a new servitude which, standing apart from all other considerations, except such as grow legitimately out of the character of the bridge and its effect upon the plaintiff's dwelling and lot, constitutes the ground for a recovery. The question is, what has the defendant added to the public easement? What new burden has it put upon the plaintiff's property by overhanging the intersection with its bridge? The answer furnishes the correct measure of the plaintiff's injury, and of his right to compensation."¹

But the building of an embankment in a street by a city as an approach to a bridge over railroad tracks is not an additional servitude, if a reasonable and sufficient space is left for the abutting owner for access to his land.²

Where a railroad corporation, under statutory authority, and with the consent of the municipality, constructed its road along a city street, upon an embankment above the grade of the street, and in order to permit of travel upon an intersecting street, graded it up to the tracks, it was held, that the owner of a lot which abutted upon the intersecting street, but not upon the street along which the railroad was constructed, was not entitled to recover from the railroad company damages caused by the elevation of the roadway of the intersecting street in front of his lot; and that the embankment upon which the railroad tracks were laid, having been erected under lawful authority, was not a nuisance, and constituted no invasion of the rights of any one save of the owners of lots abutting on the street along which it was erected.³

R. Co., 129 N. Y. 76, 29 N. E. Rep. 70, affirming 13 N. Y. Supp. 608.

¹ Jones v. Erie & W. Val. R. Co., 151 Pa. St. 30, 48, 25 Atl. Rep. 134, 17 L. R. A. 758, per Williams, J.; Knox v. New York, 55 Barb. 404; Pennsylvania Co. v. Stanley, 10 Ind. App. 421.

² Home Building & C. Co. v. Roa-

noke, 91 Va. 52, 20 S. E. Rep. 895, 27 L. R. A. 551; Willis v. Winona City, 59 Minn. 27, 60 N. W. Rep. 814, 26 L. R. A. 142.

³ Rauenstein v. New York, L. & W. R. Co., 136 N. Y. 528, 32 N. E. Rep. 1047, 18 L. R. A. 768, 7 Am. R. & Corp. Rep. 520.

521. But in some States it is held that if a city or town owns its streets in fee, and by a lawful exercise of authority grants to a railroad company permission to locate its tracks along a street, the abutting owners cannot recover damages.¹

It is the settled doctrine of the courts of New York that as against owners of lots abutting on a city street, the fee of which is in the municipality for street uses, it is competent for the Legislature to authorize the construction of the steam railroads on the grade of the streets without making compensation to the owners, though their property may be injured thereby. This doctrine is limited to cases where the railroad is laid on the same grade as the street, leaving the street substantially free and unobstructed for ordinary travel. No legal distinction is made between the case of a railroad operated by horses and one operated by steam.²

Although the abutting owner does not own the fee of the street, but his land is bounded by the exterior line, if the use of the street

¹ **California:** *Hogan v. Cent. Pac. R. Co.*, 71 Cal. 83, 11 Pac. Rep. 876; *Carson v. Cent. R. Co.*, 35 Cal. 325.

Colorado: *Colorado Cent. R. Co. v. Mollandin*, 4 Colo. 154.

Illinois: *Olney v. Wharf*, 115 Ill. 519, 5 N. E. Rep. 366; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307; *Moses v. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 516.

Iowa: *Chicago, N. & S. W. R. Co. v. Mayor*, 36 Iowa, 299; *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa, 148, 4 Am. Rep. 205.

Kansas: *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Kansas N. & D. R. Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. Rep. 1051, 16 Am. St. Rep. 479.

Kentucky: *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 53 Am. Dec. 497; *Fulton v. Short R. T. Co.*, 85 Ky. 640, 4 S. W. Rep. 332, 7 Am. St. Rep. 619.

Louisiana: *Harrison v. New Orleans & P. R. Co.*, 34 La. Ann. 462.

Michigan: *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

New York: *Kane v. New York El. R.*

Co., 125 N. Y. 164, 26 N. E. Rep. 278; *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 24 N. E. Rep. 919, 3 Am. R. & Corp. Rep. 182; *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591, 593; *Drake v. Hudson Riv. R. Co.*, 7 Barb. 508; *Fifth Nat. Bank v. New York El. R. Co.*, 24 Fed. Rep. 114; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. 1, 31 Am. Dec. 313; *Knox v. New York*, 55 Barb. 404, 411; *Patten v. New York El. R. Co.*, 3 Abb. N. C. 306, 345; *People v. Kerr*, 27 N. Y. 188, affirming 37 Barb. 357; *Kellinger v. Forty-Second St. & G. St. Ferry R. Co.*, 50 N. Y. 206.

Tennessee: *Railroad Co. v. Bingham*, 87 Tenn. 522, 11 S. W. Rep. 705; *Tennessee & A. R. Co. v. Adams*, 3 Head, 596.

West Virginia: *Arbenz v. Wheeling & H. R. Co.*, 33 W. Va. 1, 10 S. E. Rep. 14, 5 L. R. A. 371. See *Spencer v. Point Pleasant & O. R. Co.*, 23 W. Va. 406.

² *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 24 N. E. Rep. 919; *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157, 28 N. E. Rep. 640, 14 L. R. A. 133.

by a railroad becomes unreasonable, excessive, or exclusive, or such as not to leave the passage of the street substantially free and unobstructed, this may be prohibited and the adjoining owner may recover the damages sustained by him therefrom.¹

In other States, however, the abutting owners have the same equitable easements in the streets and a right to compensation, whether the title be in them or in the public.²

522. The right given to a railway company by a city to lay down and use tracks in its streets, is subject to the right of the general public to also use such streets, although the city has title to the streets in fee. The privilege thus conferred is not exclusive, but must be exercised in common with the general public. The city may still improve and control such street, and adopt all needful rules and regulations for its management and use, and it cannot alien or otherwise dispose of the same.³ “On the general question as to the rights of the public in a city street,” say the Supreme Court of the United States, “we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent landowner, or in some third person. In either case, the street is legally open and free for the public passage, and for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water pipes, gas pipes, and the like.”⁴

¹ *Fobes v. Rome*, W. & O. R. Co., 121 N. Y. 505, 24 N. E. Rep. 919; *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157, 28 N. E. Rep. 640, 14 L. R. A. 133; *Dooley Block v. Salt Lake Rap. T. Co.*, 9 Utah, 31, 33 Pac. Rep. 229; *Florida Southern R. Co. v. Brown*, 23 Fla. 104, 1 So. Rep. 512; *Elizabethtown L. & B. S. R. Co. v. Combs*, 10 Bush. 382, 19 Am. Rep. 67; *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush. 667; *Fulton v. Short Route R. T. Co.*, 85 Ky. 640, 4 S. W. Rep. 332; *Wichita & C. R. Co. v. Smith*, 45 Kan. 264, 25 Pac. Rep. 623.

² *Carli v. Union Depot, etc., Co.*, 32 Minn. 101, 20 N. W. Rep. 89; *Schurmeir v. St. Paul & P. R. Co.*, 10 Minn. 82, 88 Am. Dec. 59; *Burlington & M. Riv. R. Co. v. Reinhackle*, 15 Neb. 279, 18 N.

W. Rep. 69; *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496; *Scioto Val. R. Co. v. Lawrence*, 38 Ohio St. 41; *Cincinnati & S. G. A. St. R. Co. v. Cummins*, 14 Ohio St. 523, 541; *Crawford v. Delaware*, 7 Ohio St. 459; *Dooley Block v. Rapid Tr. Co.*, 9 Utah, 31, 33 Pac. Rep. 229; *Spencer v. Point Pleasant & O. R. Co.*, 23 W. Va. 406, 418; *Gulf, C. & S. Fe R. Co. v. Eddins*, 60 Tex. 656, overruling *Houston & T. C. R. Co. v. Odum*, 53 Tex. 343.

³ *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 563, 27 N. E. Rep. 192; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Kreigh v. Chicago*, 86 Ill. 407; *Bloomington v. Bay*, 42 Ill. 503; *Watson v. Tripp*, 11 R. I. 98, 33 Am. Rep. 420.

⁴ *Barney v. Keokuk*, 94 U. S. 324, 340.

A grant by a city ordinance of a right of way to a railroad company over a street provided that the grant shall be null and void, if the company should remove its machine shops from the city; but as no one but the city could take advantage of a violation of this condition, such violation did not *ipso facto* terminate the right of way so as to entitle an owner of land abutting upon the street to maintain an action for damages against the company as for an unlawful occupation of the street.¹

523. In several states the use of a highway for the traffic of an ordinary railroad is regarded as a public use of the highway and the abutting owner has no right of recovery whether the fee be in the public or not.²

In a few cases it has been held that it is a question of fact whether the use of a steam traction engine on a highway is lawful; that such use of it is not necessarily a nuisance, and whether it is or is not depends upon circumstances, such as the mode of the use of the motive power, and the purpose for which the highway is ordinarily used.³

In an English case it was regarded as a question of fact whether the use of a steam traction engine in a highway was a nuisance, though the court seemed to regard such use as being necessarily a nuisance, if from the nature of the engine, it was likely by its noise and appearance to frighten horses.⁴

In California a railroad company may, when authorized so to do, use a street in a city for the track of a railroad, without previous compensation to the abutting owner of the fee of the street. Referring to the distinction that such a street may be used for a street railroad engaged in the transportation of passengers, without adding to the burden of the servitude of the abutting landowner, while a similar road adapted to the transportation of freight adds a further burden of a different character to the servitude, the court say: "We fail to appreciate the philosophy of the distinction. On the

¹ Knight v. Kansas City St. Jo. & C. B. R. Co., 70 Mo. 231. Co., 5 Rich. L. 583; Arbenz v. Wheeling & N. R. Co., 33 W. Va. 1, 10 S. E. Rep. 14, 5 L. R. A. 371.

² Elizabethtown & P. R. Co. v. Thompson, 79 Ky. 52; Fulton v. Short Route R. T. Co., 85 Ky. 640, 4 S.W. Rep. 332, 7 Am. St. Rep. 619; Hill v. Chicago, St. L. & N. O. R. Co., 38 La. Ann. 599; McLaughlin v. Charlotte & S. C. R. Co., 34 Mich. 212, 22 Am. Rep. 522; Chicago, Kans. & W. R. Co. v. Union Inv. Co., 51 Kan. 600, 33 Pac. Rep. 378.

⁴ Watkins v. Reddin, 2 Fost & F. 629.

contrary, we affirm that when a public street in a city is dedicated to the general use of the public, it involves its use subject to municipal control and limitations for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a use imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control, and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress or his right to light and air shall be interfered with."¹

In Missouri, a railroad company may, with legislative sanction, lay down and operate a railroad on the street for the purposes of ordinary travel and transportation; and for any incidental injury an abutting owner has no remedy.²

The same rule is established in Oregon. In an action to enjoin a railroad company from constructing and operating its road upon a city street, and upon a county road outside the city, abutting upon both of which the plaintiff owned land in fee to the center of the street and road, and no compensation had been paid to him, the court said: "The establishment of a public highway practically divests the owner of the fee to the land, upon which it is laid, out

¹ *Montgomery v. Santa Ana W. R. Co.*, 104 Cal. 186, 191.

² *Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26, 28 S. W. Rep. 627; *Gaus & Sons' Manuf. Co. v. St. Louis, K. & N. W. R. Co.*, 113 Mo. 308, 20 S. W. Rep. 658; *Porter v. North Missouri R. Co.*, 33 Mo. 128, 137; *Tate v. M. K. & T. R. Co.*, 64 Mo. 149; *Stevenson v. Missouri Pac. R. Co. (Mo.)* 31 S. W. Rep. 793.

In the case last cited the court say: "We are aware that it has been held in a long line of decisions, beginning with *Lackland v. N. M. R. Co.*, 31 Mo.

180, and ending with *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 26 S. W. Rep. 698, that the laying of a steam railway in a street was not subjecting the abutting property to an additional servitude or different purpose from that originally designed, but we are not at all satisfied with the reasoning of those cases, and hold ourselves free to express a different view, should the question again come before us." Per Burgess, J., the Missouri rule was attacked in *Gaus & Sons' Mfg. Co. v. St. L. K. & N. W. R. Co.*, 113 Mo. 308.

of the entire present beneficial interest, of a private nature, which he had therein. It leaves him nothing but the possibility of a re-investment of his former interest, in case the highway should be discontinued as such. This view, I am aware, is contrary to the ancient doctrine that the owner of the fee owned the land subject only to such public uses, and that he had a right of action when the use was diverted to a different purpose. Such a doctrine may have been applicable where the ownership was merely subject to a right of way over the land; but where, as in modern cases, it is devoted exclusively to the purposes of a public thoroughfare, and the control thereof is committed to legally constituted authorities, charged with the duty of maintaining it for such purpose, the doctrine becomes but a vague theory, and should be laid away among the antiquities of a past age. The State has power to regulate and control the use of all public highways; and if it deems proper to admit a railway corporation to enjoy such use in common with the public, in subordination to the authorities having the immediate control of them, I cannot perceive that the owner of the fee has any more right to complain than any other member of the community has, or that his rights are affected in any greater degree.”¹

524. But even in States in which this rule prevails, no use of a street can be authorized which will destroy its use as a public thoroughfare;² or interfere with the right of an abutting owner to access to and from his property as by laying the track above or below the street grade.³ An unlawful obstruction of a street may be both a public and a private nuisance, and an abutting owner who sustains a special injury may have relief by injunction or by a suit for damages. “As owner of the land abutting upon the highway, he may suffer a particular inconvenience and damage in consequence of the location, construction, and operation of the railway thereon, and be entitled to claim compensation therefor. If the

¹ Paquet v. Mt. Tabor St. R. Co., 18 Ore. 233, 236, 22 Pac. Rep. 906, per Thayer, C. J.; McQuaid v. Portland & V. R. Co., 18 Ore. 237, 22 Pac. Rep. 899.

² Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. Rep. 698, 24 L. R. A. 516; Belcher Sugar Ref. Co. v. St. Louis Grain El. Co., 82 Mo. 121; Dubach v. Hannibal & St. Jo. R. Co., 89 Mo. 483, 1 S. W. Rep. 86.

³ Central Branch U. P. R. Co. v. Twine, 23 Kan. 585, 33 Am. Rep. 203; Knapp v. St. Louis Transf. R. Co., 126 Mo. 26, 28 S. W. Rep. 627; Cross v. St. Louis, Kan. City & N. R. Co., 77 Mo. 318; Montgomery v. Santa Ana W. R. Co., 104 Cal. 186; McQuaid v. Portland & V. R. Co., 18 Ore. 237, 22 Pac. Rep. 899.

corporation were to build its road so near his premises, or to so change the grade of the highway as to interrupt his access thereto, he might reasonably claim damages therefor; but that would arise out of the fact that he was thereby deprived of a right which inhered in his ownership of the premises, — the right of ingress and egress to and from the same by means of the highway, — and without the benefit of which they might be comparatively valueless to him.”¹

525. The measure of damages is such a sum of money as will make good the depreciation of the market value of the abutting property, caused by the construction and operation of the railroad in the street.² No recovery can be had if the fair market value of the property is as much immediately after the construction of the railroad as it was previous to its construction.

The measure of damages in a suit against a railroad company for laying its tracks on a street adjoining the plaintiff's property and using the tracks for storing cars and for side track or switching purposes, is the difference between the value of the property before the tracks were laid and so used and its value thereafter.³

Neither the injuries nor the benefits to the property of an abutting owner resulting from the construction of a railroad in a street are to be taken into consideration in case he suffers or receives these in common with the community where the property is situated, and they are not peculiar to him or connected with his ownership and enjoyment of his property.⁴

526. If the injury done by the construction of a railroad is of a permanent nature, dependent upon no contingency of which the law can take notice, the entire damage done to the property of an

¹ Paquet v. Mt. Tabor St. R. Co., 18 Ore. 233, 236, 22 Pac. Rep. 906, per Thayer, C. J. See also McQuaid v. Portland & V. R. Co., 18 Ore. 237, 22 Pac. Rep. 899.

² See § 510, relating to damages by elevated railroads; Stewart v. Ohio R. R. Co., 38 W. Va. 438, 18 S. E. Rep. 604; Fox v. Balto. & O. R. Co., 34 W. Va. 466, 12 S. E. Rep. 757; Baltimore Belt R. Co. v. McColgan (Md.) 35 Atl. Rep. 59; Streyer v. Georgia So. R. Co., 90 Ga. 56, 15 S. E. Rep. 637; Florida So. R. Co. v. Brown, 23 Fla. 104, 1 So.

Rep. 512; Jeffersonville M. & I. R. Co. v. Esterle, 13 Bush, 667; Imlay v. Union Branch R. Co., 26 Conn. 249, 68 Am. Dec. 392; Kucheman v. Chicago, C. & D. R. Co., 46 Iowa, 366; Henderson v. New York Cent. R. Co., 78 N. Y. 423.

³ Stevenson v. Missouri Pac. R. Co. (Mo.) 31 S. W. Rep. 793; Schopp v. St. Louis, 117 Mo. 131, 22 S. W. Rep. 898, 20 L. R. A. 783; Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. Rep. 698.

⁴ Morrow v. St. L. A. & T. R. Co., 81 Tex. 405, 17 S. W. Rep. 44.

abutting owner may be recovered in a suit in equity, and not merely the damage sustained prior to the commencement of the action.¹ A railroad is a permanent structure, and it cannot be assumed that it is liable to change, or to discontinuance. Of course a recovery in such case for the whole injury, prospective as well as past, is a bar to any further recovery growing out of a continuance of the cause of the injury.²

In an action at law, however, the abutting owner cannot recover, without the defendant's acquiescence, permanent damages measured by the diminution in value of the plaintiff's property, but can recover such temporary damages only as he has sustained up to the time of commencing the action.³

A purchaser or lessee of the obstructing railroad is jointly liable with the original owner who constructed the road for a permanent injury to the property of an abutting owner, caused by the construction of the road.⁴

527. Successive suits for damages may be maintained for the construction of a railroad in a public street interfering with the rights of an abutter and constituting a continuous trespass. "If the use and occupation of this street were unlawful, it was a continuing trespass, for which repeated actions to recover damages will lie as long as the trespass is continued, until the occupancy ripens into title by prescription. The distinction between an action for trespass and a proceeding to ascertain the compensation to be paid for

¹ New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 S. Ct. Rep. 743; See also § 511.

Troy v. Cheshire R. Co., 23 N. H. 83, 54 Am. Dec. 177; Fowle v. New Haven & N. R. Co., 107 Mass. 352, 112 Mass. 334; Leavenworth, N. & S. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. Rep. 297; Central Branch U. P. R. Co. v. Andrews, 26 Kan. 702; Jacksonville, T. & K. W. R. Co. v. Lockwood, 33 Fla. 573, 15 So. Rep. 327; Pensacola & A. R. Co. v. Jackson, 21 Fla. 146; Florida So. R. Co. v. Brown, 23 Fla. 104, 1 So. Rep. 512, disapproved so far as it is inconsistent; Stewart v. Ohio Riv. R. Co., 38 W. Va. 438, 18 S. E. Rep. 604; Fox v. Balto. & O. R. Co., 34 W. Va. 466, 12 S. E. Rep. 757; Beach v. Wilmington & W. R. Co. (N. C.) 26 S. E. Rep. 703.

² Chicago & Alton R. Co. v. Maher, 91 Ill. 312; Jacksonville, T. & K. W. R. Co. v. Lockwood, 33 Fla. 573, 15 So. Rep. 327.

³ New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 S. Ct. Rep. 743, per Gray, J., citing *In re* New York El. R. Co., 70 N. Y. 327; *In re* Gilbert El. R. Co., 70 N. Y. 361; Story v. New York El. R. Co., 90 N. Y. 122; Lahr v. Met. El. R. Co., 104 N. Y. 268, 10 N. E. Rep. 528; Pond v. Met. El. R. Co., 112 N. Y. 186, 19 N. E. Rep. 487.

⁴ Stickley v. Chesapeake & O. R. Co. (Ky.) 20 S. W. Rep. 261, 52 Am. & Eng. R. Cas. 56.

the permanent taking of property for railway purposes must be kept in mind. This is the former, and in it only such damages can be recovered as had accrued at the date of the commencement of the action. The payment of the verdict or judgment would give defendant no right to continue its use of the street; and if, instead of plaintiff's bringing this action, the defendant had instituted condemnation proceedings, the award of compensation would not have included damages for prior trespasses, nor would the payment of the award be a bar to an action for such damages."¹

If the occupation of the street or road is by lawful authority, and a right of an abutting owner, such as his right of access, for instance, is impaired thereby, the injury is a permanent one, and the damages should be recovered in one action. The taking of the street for permanent occupation, when this is lawful, and cannot be resisted by the abutting landowner, is a permanent injury. He can only demand compensation for the injury done to his property, which must be recovered in one suit. "There is a broad distinction between those injuries occasioned by causes, permanent in their character, and which are likely to continue, with no right in plaintiff to abate them, and those which arise from nuisances which may be discontinued. In respect to the former, the entire damages, past and prospective, can be estimated, and the cause of action cannot be split up, while as to the latter it is not to be presumed that the wrongs will be continued; and it would be unjust to defendant to allow plaintiff to recover damages estimated upon such an assumption. On the other hand, it would be equally wrong to permit defendant to insist upon such a rule of compensation, and thus become vested with a perpetual license to commit a nuisance to the injury of plaintiff and over his protest. * * * All uses of such street in excess of what is necessary for the ordinary and proper operation of the road, such as running trains faster than permitted by law, making dangerous switches, parking cars, using it as a switch yard, keeping engines and trains standing unnecessarily long, if such uses substantially destroy the easement in the highway and

¹ Lamm v. Chicago, St. P. M. & O. R. Co., 45 Minn. 71, 76, 47 N. W. Rep. 455, per Mitchell, J., citing Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215; Hursh v. First Div. R. Co., 17 Minn. 439; Adams v. Hastings & Dak. R. Co., 18 Minn. 260; Brakkenn v. Min. & St. L. R. Co., 29 Minn. 41, 11 N. W. Rep. 124. See also Harmon v. L., N., O. & T. R. Co., 87 Tenn. 614, 11 S. W. Rep. 703; Smith v. East End St. R. Co., 87 Tenn. 626, 11 S. W. Rep. 709; Uline v. New York C. & H. R. Co., 101 N. Y. 98, 4 N. E. Rep. 536.

the right of ingress and egress, are unlawful, and may be abated. Such uses are not of a permanent character, but are recurrent, and every act is a new wrong, and successive actions may be brought, each recovery embracing only the damages sustained up to the commencement of the action. It vests the defendant with no right to continue the wrongs, and affords no protection against a subsequent suit." ¹

528. It is competent to take into consideration the noise and confusion incident to the operation of trains, and injuries from smoke and soot and cinders from passing engines, the ringing of bells and any other injuries which the owner may have sustained in respect to his property, not suffered in common by the public generally,² in estimating the damages which one may recover for the construction and operation of a railroad in close proximity to his property.

IX. *Abandonment and Obstruction of Public Ways.*

529. Whether the public rights in highways may be lost by adverse possession is a question upon which there is a division of opinion. In several States it is held that such public rights may be barred by the statute of limitations in the same way that private rights may be barred. The inclosure and occupation of land within the limits of a highway for twenty years or for the statutory period required to give title by possession are sufficient in these States to give title to the land so inclosed and occupied as

¹ Harmon v. Railroad Co., 87 Tenn. 614, 623, 11 S. W. Rep. 703, per Dickinson, J.; Chicago, K. & W. R. Co. v. Union Inv. Co., 51 Kan. 600, 33 Pac. Rep. 378; Pappenheim v. Met. El. R. Co., 128 N. Y. 436, 28 N. E. Rep. 518.

² Baltimore & P. R. Co. v. Fifth Bap. Church, 108 U. S. 317, 329, 2 S. Ct. Rep. 719; Bischoff v. New York El. R. Co., 138 N. Y. 257, 33 N. E. Rep. 1073; Stanley v. New York El. R. Co., 44 N. Y. St. R. 389, 17 N. Y. Supp. 931; Drucker v. Manhattan R. Co., 106 N. Y. 157, 164, 12 N. E. Rep. 568; Omaha & N. P. R. Co. v. Janecek, 30 Neb.

276, 46 N. W. Rep. 478, 27 Am. St. Rep. 399; Chicago, K. & N. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. Rep. 93; Blakeley v. Chicago, K. & N. R. Co., 25 Neb. 207, 40 N. W. Rep. 956; Elizabethtown, L. & B. S. R. Co. v. Combs, 10 Bush, 382, 19 Am. Rep. 67; Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush, 667; Stickley v. Chesapeake & O. R. Co. (Ky.), 20 S. W. Rep. 261, 52 Am. & Eng. R. Cas. 56; Columbus, H. V. & T. R. Co. v. Gardner, 45 Ohio St. 309, 316, 13 N. E. Rep. 69; Alabama & V. R. Co. v. Bloom, 71 Miss. 247, 15 So. Rep. 72.

against the public.¹ "We see no reason," say the Supreme Court of West Virginia, in an elaborate decision, "why municipal corporations should not be held to the same degree of diligence in

¹ **Arkansas:** *Fort Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19, 5 Am. & Eng. Corp. Cas. 453.

Connecticut: *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86; *Litchfield v. Wilmot*, 2 Root, 288. See, however, *Brownell v. Palmer*, 22 Conn. 107, 121, commenting upon, but not overruling, *Beardslee v. French*, *supra*.

Illinois: *Peoria v. Johnston*, 56 Ill. 45; *Chicago & N. W. R. Co. v. Elgin*, 91 Ill. 251; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25, 40; *Smith v. Bangs*, 15 Ill. 399.

Iowa: *Burlington v. B. & M. R. Co.*, 41 Iowa, 134; *Davies v. Huebner*, 45 Iowa, 574; *Pella v. Scholte*, 24 Iowa, 283, 95 Am. Dec. 729; *Smith v. Gorrell*, 81 Iowa, 218, 46 N. W. Rep. 992. See, however, *Waterloo v. Union Mill Co.*, 72 Iowa, 437, 34 N. W. Rep. 197.

Kentucky: In this State, prior to the Act of 1883, G. S. 1894, §§ 2546, 2547, declaring that no adverse holding should begin against a municipal corporation until the occupant notified the city authorities of his purpose to hold and claim as against the city or town, a city could be barred from recovering real estate in the same manner that an individual claimant could have been. *Rowan v. Portland*, 8 B. Mon. 232, 259; *Cornwall v. Louisville & N. R. Co.*, 87 Ky. 72, 7 S. W. Rep. 553; *Alves v. Henderson*, 16 B. Mon. 131; *Dudley v. Frankfort*, 12 B. Mon. 610.

Massachusetts: *Attorney-General v. Revere Copper Co.*, 152 Mass. 444, 25 N. E. Rep. 605; See as to what constitutes adverse possession, *Holt v. Sargent*, 15 Gray, 97; *Henshaw v. Hunting*, 1 Gray, 203; *Parker v. Framingham*, 8 Met. 260. It is provided by statute that fences maintained in a highway for forty years may be continued as

against the public. P. S. 1882, c. 54, § 1; *Holt v. Sargent*, 15 Gray, 97; *Cutter v. Cambridge*, 6 Allen, 20.

Michigan: *Gregory v. Knight*, 50 Mich. 61, 14 N. W. Rep. 700; *Coleman v. Flint & P. M. R. Co.*, 64 Mich. 160, 31 N. W. Rep. 47; *Big Rapids v. Comstock*, 65 Mich. 78, 31 N. W. Rep. 811; *Essexville v. Emery*, 90 Mich. 183, 51 N. W. Rep. 204; *Flynn v. Detroit*, 93 Mich. 590, 53 N. W. Rep. 815.

Minnesota: *St. Paul v. Chicago, M. & St. P. R. Co.*, 45 Minn. 387, 48 N. W. Rep. 17; *Redwood County v. Winona & St. Peter L. Co.*, 40 Minn. 512, 41 N. W. Rep. 465, 42 N. W. Rep. 473.

Nebraska: *Lewis v. Baker*, 39 Neb. 636, 58 N. W. Rep. 126; *Meyer v. Lincoln*, 33 Neb. 566, 50 N. W. Rep. 763; *Schock v. Falls City*, 31 Neb. 599, 48 N. W. Rep. 468.

New Hampshire: *Webber v. Chapman*, 42 N. H. 326, 80 Am. Dec. 111; *State v. Morse*, 50 N. H. 9; *State v. Atherton*, 16 N. H. 203.

Ohio: Adverse possession of a highway may be acquired by the erection of a permanent improvement. *Cincinnati v. Evans*, 5 Ohio St. 594; *Cincinnati v. First Presby. Ch.*, 8 Ohio, 298, 32 Am. Dec. 718. But not by the erection of a fence or hedge. *Heddleston v. Hendricks*, 52 Ohio St. 460, 40 N. E. Rep. 408; *McClelland v. Miller*, 28 Ohio St. 488; *Lane v. Kennedy*, 13 Ohio St. 42; *Fox v. Hart*, 11 Ohio, 414; *Stevens v. Shannon*, 6 Ohio C. C. 142.

South Carolina: *Bowen v. Team*, 6 Rich. 298, 60 Am. Dec. 127; *State v. Pettis*, 7 Rich. 390; *Georgetown v. Taylor*, 2 Bay 282, 1 Am. Dec. 647.

Texas: *Galveston v. Menard*, 23 Tex. 349. But it was said that the possession which will give title to a street should be both under claim of deed and

guarding their streets and squares from encroachments as natural persons are in protecting their property from the adverse claims of others. We do see great reason why no time should bar the sovereign power, because the officers of the sovereign, whether king or State, have such various and onerous duties to perform that the rights of the sovereign may be neglected; and all the people of the kingdom or State are interested in having the rights of the sovereign preserved intact, and not subject to be impaired or lost by the neglect of officers; but the same reason does not apply to a municipal corporation. A city or town is a compact community, with its city or town council, its committee on streets and alleys, and its street commissioner, whose special duty it is to see that the streets and alleys and squares are kept in proper order and free from obstructions and encroachments. And if with all this machinery and power confined to so narrow a compass and the interest of the corporation to exercise it, the city authorities permit an individual to encroach upon the streets, alleys or squares of the city, and hold, enjoy and occupy the same, claiming them as his own under his title, without interruption or disturbance in that right, for the period prescribed in the statute of limitations, the city not only does, but we think, according to reason as well as authority, ought to lose all right thereto.”¹

530. The possession which operates to bar public rights in a highway and confer private rights must be actual, exclusive, open, and uninterrupted.² A railroad company, which has laid its track

adverse. In *Coleman v. Thurmond*, 56 Tex. 514, it was said that the statute of limitations would no more run against a county or city which is a subdivision of the State than against the State itself. See *Ostrom v. San Antonio*, 77 Tex. 345, 14 S. W. Rep. 66.

Vermont: *Knight v. Heaton*, 22 Vt. 480.

Virginia: *Richmond v. Poe*, 24 Gratt. 149; *Manchester Cotton Mills v. Manchester*, 25 Gratt. 825.

West Virginia: *Wheeling v. Campbell*, 12 W. Va. 36; *Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. Rep. 130; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. Rep. 740.

¹ *Wheeling v. Campbell*, 12 W. Va. 36, 66, quoted with approval in *Meyer v. Lincoln*, 33 Neb. 566, 572, 50 N. W. Rep. 763, citing *Dudley v. Frankfort*, 12 B. Mon. 610.

² *Searby v. Tottenham R. Co.*, L. R. 5 Eq. 409; *Meyer v. Lincoln*, 33 Neb. 566, 18 L. R. A. 146, 50 N. W. Rep. 763; *Davies v. Huebner*, 45 Iowa, 574; *Marble v. Price*, 54 Mich. 466, 20 N. W. Rep. 531; *Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. Rep. 130; *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. Rep. 759; *Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157; *McFarlane v. Kerr*, 10 Bosw. 249; *Reilly v. Racine*, 51 Wis. 526, 8 N. W. Rep. 417; *Lane v. Ken-*

in a public street, under authority conferred by its charter, upon condition that it shall not impair or interfere with the proper use of the street, is presumed to hold possession subject to the public use of the street as a highway, and not hostile or adverse to the public right. "Something more than the mere presence of the track upon the road or street — a claim of a hostile right, or an exclusion of the public from the use — will be required to show the possession adverse to the public."¹

531. On the other hand, it is the rule in many states that no one can acquire by adverse use or occupation a prescriptive right to land dedicated to the public as a highway or a park or for other public use. Neither non-user by the public, nor the rule of prescription, nor the statute of limitations, can be invoked as against the right.²

nedy, 13 Ohio St. 42; Stevens v. Shannon, 6 Ohio C. C. 142.

¹ Wayzata Village v. Great Northern Ry. Co., 50 Minn. 438, 444, per Gilfillan, C. J.

² Dawes v. Hawkins, 8 C. B. N. S. 848, 858; Gerring v. Barfield, 16 C. B. N. S. 597; Turner v. Ringwood Board, L. R. 9 Eq. 418; Simplot v. Chicago, M. & St. P. Ry. Co., 16 Fed. Rep. 350; Grogan v. Hayward, 4 Fed. Rep. 161.

Alabama: Ham v. Common Council (Ala.) 14 So. Rep. 9; Webb v. Demopolis, 95 Ala. 116, 13 So. Rep. 289, 21 L. R. A. 62; Sherer v. Jasper, 93 Ala. 530, 9 So. Rep. 584; Reed v. Birmingham, 92 Ala. 339, 9 So. Rep. 161, 33 Am. & Eng. Corp. Cas. 469; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177; Olive v. State, 86 Ala. 88, 5 So. Rep. 653; Kennedy v. Jones, 11 Ala. 63.

California: Ames v. San Diego, 101 Cal. 390, 36 Pac. Rep. 1005; Hoadley v. San Francisco, 50 Cal. 265; Board of Education v. Martin, 92 Cal. 209, 28 Pac. Rep. 799; San Francisco v. Bradbury, 92 Cal. 414, 28 Pac. Rep. 803; People v. Pope, 53 Cal. 437; Visalia v. Jacob, 65 Cal. 434, 6 Am. & Eng. Corp. Cas. 115, 52 Am. Rep. 303; San Lean-

dro v. Le Breton, 72 Cal. 170, 13 Pac. Rep. 405; Yolo County v. Barney, 79 Cal. 375, 12 Am. St. Rep. 152; Orena v. Santa Barbara, 91 Cal. 621, 28 Pac. Rep. 268.

Indiana: Wolfe v. Sullivan, 133 Ind. 331, 32 N. E. Rep. 1017; Freedom v. Norris, 128 Ind. 377, 27 N. E. Rep. 869; Schmidt v. Draper (Ind.) 36 N. E. Rep. 709; Collett v. Vanderburgh County, 119 Ind. 27, 21 N. E. Rep. 329; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Sims v. Frankfort, 79 Ind. 446; Cheek v. Aurora, 92 Ind. 107.

Kansas: Webb v. Butler County, 52 Kans. 375, 34 Pac. Rep. 973.

Louisiana: Ingram v. Police Jury, 20 La. Ann. 226; Sheen v. Stothart, 29 La. Ann. 630; Shreveport v. Walpole, 22 La. Ann. 526.

Maine: Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 Atl. Rep. 902, 8 L. R. A. 828; Knox v. Chaloner, 42 Me. 150; Dwinel v. Barnard, 28 Me. 554, 570, 48 Am. Dec. 507. A statute provides that fences maintained in a highway for forty years give a right to continue them against the public. This is declared to be the only statute in this State which limits the force of the maxim, *nullum tempus occurrit regi*. R.

532. This rule is in application of the maxim *Nullum tempus occurrit regi*. The rule that no right by adverse possession can be gained against the public has the weight of authority in its support. "The grounds upon which this rule rests are variously stated; as, that an obstruction is a nuisance, and no nuisance can ripen into a right; that individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have

S. ch. 18, § 76; *Stetson v. Bangor*, 73 Me. 357, 359; *Heald v. Moore*, 79 Me. 271, 9 Atl. Rep. 734. There is a similar statute in Massachusetts. P. S. 1882, ch. 54, § 1.

Maryland: *Baltimore v. Frick*, 82 Md. 77, 33 Atl. Rep. 435.

Mississippi: *Vicksburg v. Marshall*, 59 Miss. 563, apparently overruling *Clements v. Anderson*, 46 Miss. 581, which, however, is not referred to.

Missouri: R. S. Mo. 1889, § 6772, G. S. 1865, p. 746, § 7, which declares that the statute of limitations shall not apply to lands granted to any public use. *Brown v. Carthage*, 128 Mo. 10, 30 S. W. Rep. 312; *St. Louis v. Missouri Pac. R. Co.*, 114 Mo. 13, 22, 21 S. W. Rep. 202; *State v. Culver*, 65 Mo. 607, 27 Am. Rep. 295; otherwise before the statute, *School Directors v. Goerges*, 50 Mo. 194; *Callaway County v. Nolley*, 31 Mo. 393; *St. Charles County v. Powell*, 22 Mo. 525, 66 Am. Dec. 637; *Williams v. St. Louis*, 120 Mo. 403, 25 S. W. Rep. 561.

New Jersey: *Price v. Plainfield*, 40 N. J. L. 608; *Humphreys v. Woodstown*, 48 N. J. L. 588, 595, 7 Atl. Rep. 301; *Laing v. United N. J. R. & C. Co.*, 54 N. J. L. 576, 25 Atl. Rep. 409; *Smith v. State*, 23 N. J. L. 712; *Cross v. Morristown*, 18 N. J. Eq. 305; *Jersey City v. Morris Canal & B. Co.*, 12 N. J. Eq. 547, 561; *Trustees v. Hoboken*, 33 N. J. L. 13, 97 Am. Rep. 696.

New York: *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. Rep. 514; *St. Vincent's Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286; *Bliss v. Johnson*, 94

N. Y. 235; *Burbank v. Fay*, 65 N. Y. 57; *Walker v. Caywood*, 31 N. Y. 51; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160. Otherwise, if the public has not taken possession of the land dedicated. *Baldwin v. Buffalo*, 29 Barb. 396.

North Carolina: *Morse v. Carson*, 104 N. C. 431, 10 S. E. Rep. 689. See *Armstrong v. Dalton*, 4 Dev. (L.) 568, which seems to be overruled.

Pennsylvania: *Penny Pot Landing v. Philadelphia*, 16 Pa. St. 79; *Evans v. Erie County*, 66 Pa. St. 222; *Philadelphia v. Philadelphia & R. R. Co.*, 58 Pa. St. 253; *Kupt v. Utter*, 101 Pa. St. 27; *Commonwealth v. Moorhead*, 118 Pa. St. 344, 12 Atl. Rep. 424; *Susquehanna County v. Deans*, 33 Pa. St. 131; *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *Flick's Estate*, 6 Kulp. 329; *Pittsburgh, M. & Y. R. Co. v. Commonwealth*, 104 Pa. St. 583.

Rhode Island: *Almy v. Church*, 18 R. I. 182, 26 Atl. Rep. 58; *Simmons v. Cornell*, 1 R. I. 519. But adverse possession applies to land dedicated to a charitable use for a portion of the public. *Mowry v. Providence*, 10 R. I. 52.

Tennessee: *Sims v. Chattanooga*, 2 Lea 694. See, however, *Memphis v. Lenore*, 6 Coldw. 412.

Virginia: *Depriest v. Jones* (Va.) 21 S. E. Rep. 478; *Yates v. Warrenton*, 84 Va. 337, 4 S. E. Rep. 818; *Norfolk City v. Chamberlaine*, 29 Gratt. 534; *Taylor v. Commonwealth*, 29 Gratt. 780.

Wisconsin: *Childs v. Nelson*, 69 Wis. 125, 135, 33 N. W. Rep. 587; *Witter v. Damitz*, 81 Wis. 385, 51 N. W. Rep. 385.

interest sufficient to make them vigilant, while in public rights of property each individual feels but a slight interest and will tolerate a manifest encroachment rather than seek a dispute to set it right; that public policy requires the preservation of public rights, and that a municipality cannot, by permissive neglect, invest an intruder with title to a public highway. These reasons are very cogent, and in our opinion outweigh the authorities which are opposed to them.”¹

533. The rule is general that adverse possession and the Statute of Limitations do not run against the State,² except where it is expressly included.³ In some States this is a prerogative of the sovereign power alone;⁴ while in others it is held to apply also in favor of such subdivisions of the State as towns, cities and counties.⁵

The rule of the common law that no statute of limitations and no prescription runs against the sovereign power is not everywhere the rule at the present day, though it is quite generally recognized. “The statute of George the Third⁶ changed the law of England,

¹ *Almy v. Church*, 18 R. I. 182, 187, 26 Atl. Rep. 58, per Stiness, J. To like effect, see *Commonwealth v. Alburger*, 1 Whart. 469.

² *United States v. Hoar*, 2 Mason, 311; *Wiggins v. Kirby*, 106 Ala. 262, 17 So. Rep. 354; *Wagnon v. Fairbanks*, 105 Ala. 527, 17 So. Rep. 20; *Iverson v. Dubose*, 27 Ala. 418; *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236; *Chamberlain v. Ahrens*, 55 Mich. 111, 20 N. W. Rep. 814; *Taylor v. Commonwealth*, 29 Gratt. 780; *Levasser v. Washburn*, 11 Gratt. 572.

³ As in *Kentucky*, G. S. 1894, § 2523.

Missouri: *Abernathy v. Dennis*, 49 Mo. 468.

North Carolina: *Walker v. Moses*, 113 N. C. 527, 18 S. E. Rep. 339; *Armstrong v. Dalton*, 4 Dev. (L.) 568.

Vermont: *Knight v. Heason*, 22 Vt. 480.

⁴ See § 529; also *Gaines v. Hot Springs County*, 39 Ark. 262; *Fort Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19; *Clements v. Anderson*, 46 Miss. 581, which seems, however, to

be overruled in *Vicksburg v. Marshall*, 59 Miss. 563; *Pella v. Scholte*, 24 Iowa, 283, 95 Am. Dec. 729, per Dillon, C. J.; *May v. Cass County School Dist.*, 22 Neb. 205, 34 N. W. Rep. 377; *School Directors v. Goerges*, 50 Mo. 194; *St. Charles County v. Powell*, 22 Mo. 525, 66 Am. Dec. 637; *Callaway County v. Nolley*, 31 Mo. 393; but otherwise under present statute; *Knight v. Heaton*, 22 Vt. 480; *Evans v. Erie County*, 66 Pa. St. 222; *Dudley v. Frankfort*, 12 B. Mon. 610; *Memphis v. Lenore*, 6 Coldw. 412; *Armstrong v. Dalton*, 4 Dev. (L.) 568; *Cincinnati v. Evans*, 5 Ohio St. 594; *Wheeling v. Campbell*, 12 W. Va. 36; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. Rep. 740.

⁵ See § 530; also *Waterloo v. Union Mill Co.*, 72 Iowa, 437, 34 N. W. Rep. 197; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Brownell v. Palmer*, 22 Conn. 107, 121; *Dygart v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575.

⁶ 9 Geo. III., ch. 16.

and extended the statute of limitations to real actions brought by the king. Since the passage of that act prescription has been pleadable there against the sovereign. The rule of the common law prevailed in Massachusetts until the enactment of the Revised Statutes in 1835,¹ when the statute of limitations of real actions was made applicable to suits brought by or in behalf of the Commonwealth. Under this statute a title by disseisin may be acquired against the Commonwealth as readily as against a private person, and, by analogy, there seems to be no good reason why prescriptive rights in the real estate of the Commonwealth may not also be acquired.”²

534. A use of a highway adverse to the public right is a nuisance and is punishable as such.³ Hence it is argued that such a use cannot ripen into a right. The cases hold that the maintenance of a public nuisance for twenty years does not give a prescriptive right to maintain it. “The reason of the rule to which these cases refer is, that criminality can gain no toleration in the law. The creation and maintenance of a public nuisance is punishable criminally; hence the element of criminality, which characterizes the act of creating it, should prevent the acquisition of a right to maintain it. The rule, as sometimes broadly stated, is not of universal application. An adjacent landowner, who erects and maintains a fence along a highway in such a position as to include in his enclosure a part of the highway, may be indicted for maintaining a public nuisance. Yet, by our statutes, if he so maintains it for forty years,⁴ he thereby acquires a prescriptive right against the public to have it remain there forever. The same rule applies if the fence is on a town way, private way, training field, burying-place, landing-place, or other land appropriated for the general use or convenience of the inhabitants of the Commonwealth, or of a

¹ R. S. 1835, ch. 119, § 12, P. S. 1882, ch. 196, § 11.

² Attorney-General v. Revere Copper Co., 152 Mass. 444, 25 N. E. Rep. 605, per Knowlton, J.

³ Wolfe v. Sullivan, 133 Ind. 331, 32 N. E. Rep. 1017; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; New Salem v. Eagle Mill Co., 138 Mass. 8; Morton v. Moore, 15 Gray, 573; Common-

wealth v. Upton, 6 Gray, 473; Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 Atl. Rep. 902; Knox v. Chaloner, 42 Me. 150; Commonwealth v. McNaugher, 131 Pa. St. 55, 18 Atl. Rep. 934.

⁴ P. S. 1882, ch. 54, § 1; Winslow v. Nayson, 113 Mass. 411; Cutter v. Cambridge, 6 Allen, 20; Commonwealth v. Blaisdell, 107 Mass. 234.

county, town, or parish. So, under the Revised Statutes,¹ suppose an exclusive occupation by an individual of land held by the Commonwealth for a public use, and a maintenance by him of such a possession as constitutes a disseisin in some way other than by the erection of a fence or a building; such an interference with the sights of the public would be a public nuisance, and subject him to an indictment; yet at the end of twenty years he would have a title by disseisin, and the Commonwealth could not dislodge him."²

535. The non-user of a highway by the public for twenty years, or the statutory period of limitation, affords a presumption of abandonment of the easement; but this presumption is not very strong unless it is aided by some act of the owner in fee of the land occupied by the highway, such as an open, adverse, and exclusive possession of it by him.³

The presumption in such case may be regarded as a presumption that the highway had been discontinued by competent authority. "Such a presumption would stand on the same grounds as that of a non-appearing grant, or a lost record, and if properly supported by evidence would justify the jury in inferring that whatever was necessary to give legal effect and operation to a discontinuance of the way was rightly done. In this view, evidence that the plaintiff's grantor, as early as 1803, had erected a fence across the alleged way, tended directly to sustain the presumption that it had been discontinued as a public way. * * * This easement,

¹ R. S. ch. 119, § 12; P. S. 1882, ch. 196, § 11, limiting actions for the recovery of lands by the Commonwealth to twenty years.

² Attorney-General v. Revere Copper Co., 152 Mass. 444, 452, 25 N. E. Rep. 605, per Knowlton, J.

³ Hillary v. Waller, 12 Ves. Jr. 239; Hazard v. Robinson, 3 Mason, 272; Hartford v. New York & N. E. R. Co., 59 Conn. 250, 22 Atl. Rep. 37; Auburn v. Goodwin, 128 Ill. 57, 21 N. E. Rep. 212; Peoria v. Johnston, 56 Ill. 44; Winnetka v. Prouty, 107 Ill. 218; Larson v. Fitzgerald, 87 Iowa, 402, 54 N. W. Rep. 441; Orr v. O'Brien, 77 Iowa, 253, 42 N. W. Rep. 183; Davies v. Huebner, 45 Iowa, 574; Simplot v. Dubuque, 49

Iowa, 630; Smith v. Gorrell, 81 Iowa, 218, 46 N. W. Rep. 992; Louisville, N. A. & C. R. Co. v. White, 94 Ind. 257; Hamilton v. State, 106 Ind. 361, 7 N. E. Rep. 9; Jeffersonville M. & T. R. Co. v. O'Connor, 37 Ind. 95; Buffalo v. Delaware L. & W. R. Co., 39 N. Y. Supp. 4; Corning v. Gould, 16 Wend. 531; Woodruff v. Paddock, 56 Hun, 288; Devaux v. Detroit, Harr. Ch. (Mich.) 98; State v. Young, 27 Mo. 259; Bruce v. Saline County, 26 Mo. 262; Willey v. Norfolk So. R. Co., 96 N. C. 408; Lake Shore & M. S. R. Co. v. Cleveland, 1 Ohio Dec. 1, 32 Ohio L. J. 206; Fox v. Hart, 11 Ohio, 414; Reilly v. Racine, 51 Wis. 526, 530, 8 N. W. Rep. 417.

whether public or private, might be destroyed or defeated by a discontinuance of the way; and its obstruction by successive owners or occupiers of the close, by whatever right or title they were possessed of the premises, was competent proof as tending to show that the right of way no longer existed.”¹

536. To constitute an abandonment under this rule, an adverse use should be shown for the statutory period of limitation, at least, and it should be further shown that there was a total abandonment of the highway for that period.² If a highway is kept open and fenced on both sides, and the public is not excluded, and it is used by the adjoining owners, there is no abandonment.³

But non-user of a highway for a less period than the local period of limitation does not generally amount to an abandonment of it, unless an intention to abandon is shown.⁴ In those States in which a prescriptive right or adverse possession can not be invoked against the public, and abandonment is not shown by mere lapse of time without some other evidence,⁵ mere non-user does not generally operate to defeat the rights of the public in a highway unless there is at the same time a use of the highway adverse to the public;⁶ or there is evidence of an intention to abandon,⁷ which may be shown by neglect to repair and keep in condition for use as a highway.⁸

A city is estopped to set up any claim to streets or other lands the right of public use of which it has abandoned by taxing it as private property.⁹

537. An abandonment of a public way must be clearly proven. A non-use of the way by the public does not amount to an abandon-

¹ *Holt v. Sargent*, 15 Gray, 97, 101, per Bigelow, J. And see *Brockhausen v. Bochland*, 137 Ill. 547, affirming 36 Ill. App. 224; *Lathrop v. Central Iowa R. Co.*, 69 Iowa, 105, 28 N. W. Rep. 465.

² *Orr v. O'Brien*, 77 Iowa, 253, 42 N. W. Rep. 183; *Curran v. Louisville*, 83 Ky. 628; *Emerson v. Wiley*, 10 Pick. 310; *Kelly Nail & I. Co. v. Lawrence Furnace Co.*, 46 Ohio St. 544, 5 L. R. A. 652, 22 N. E. Rep. 639.

³ *State v. Morse*, 50 N. H. 9.

⁴ *Reilly v. Racine*, 51 Wis. 526, 8 N. W. Rep. 417; *Parker v. St. Paul*, 47

Minn. 317, 50 N. W. Rep. 247; *Emerson v. Wiley*, 10 Pick. 310.

⁵ *Baltimore v. Frick*, 82 Md. 77, 33 Atl. Rep. 435.

⁶ *Davies v. Huebner*, 45 Iowa, 574.

⁷ *Woodruff v. Paddock*, 56 Hun, 288.

⁸ *Vanderbeck v. Rochester*, 46 Hun, 87; *In re Lexington Av.*, 92 N. Y. 629, 29 Hun, 303; *Horey v. Haverstraw*, 124 N. Y. 273, 26 N. E. Rep. 532; *Storm v. Barger*, 43 Ill. App. 173; *Larson v. Fitzgerald*, 87 Iowa, 402; 54 N. W. Rep. 441.

⁹ *Smith v. Osage*, 80 Iowa, 84, 45 N. W. Rep. 404; *Simplot v. Dubuque*, 49 Iowa, 630.

ment unless it is shown that such non-use has continued for a sufficient length of time to indicate an intention to abandon.¹ "A mere temporary suspension of the enjoyment of the use, which is not voluntary, but the result of accident or of causes which the party claiming the right cannot control, does not indicate an intention to abandon the right to the easement."²

Mere silent non-user for any length of time does not generally deprive the public of its rights in a highway.³ Certainly until a highway is required for actual use so that the public authorities may be called upon to open it, no mere non-user for any length of time will operate as an abandonment of it.⁴

538. But if a highway has been abandoned for a great length of time and another road has been opened, traveled by the public, and recognized by the public authorities, an abandonment may be presumed.⁵ Acquiescence for even a few years in the discontinuance of an old road and the adoption of another are sufficient to show an abandonment of the old road in the absence of evidence of a contrary intention.⁶ The acceptance of the new way in place of the old may be regarded as conclusive of the abandonment of the old.⁷

¹ *Baltimore v. Frick*, 82 Md. 77, 33 Atl. Rep. 435; *Madison v. Gallagher*, 159 Ill. 105, 113, 42 N. E. Rep. 316; *Power v. Watkins*, 58 Ill. 380; *Lewiston v. Proctor*, 27 Ill. 414; *Horey v. Haverstraw*, 124 N. Y. 273, reversing 47 Hun, 356; *Curran v. Louisville*, 83 Ky. 628.

² *Madison v. Gallagher*, 159 Ill. 105, 113, 42 N. E. Rep. 316; *Maire v. Kruse*, 85 Wis. 302, 26 L. R. A. 449.

³ *Sheen v. Stothart*, 29 La. Ann. 630; *Rowan v. Portland*, 8 B. Mon. 232; *Commonwealth v. McNaugher*, 131 Pa. St. 55, 18 Atl. Rep. 934; *Commonwealth v. Moorehead*, 118 Pa. St. 344, 12 Atl. Rep. 424.

⁴ *Parker v. St. Paul*, 47 Minn. 317, 50 N. W. Rep. 247; *Henshaw v. Hunting*, 1 Gray, 203; *Solberg v. Decorah*, 41 Iowa, 501; *Derby v. Alling*, 40 Conn. 410; *Curran v. Louisville*, 83 Ky. 628; *Reilly v. Racine*, 51 Wis. 526, 8 N. W. Rep. 417; *Childs v. Nelson*, 69 Wis. 125, 33 N. W. Rep. 587.

⁵ *Galbraith v. Littlech*, 73 Ill. 209; *Peoria v. Johnston*, 56 Ill. 44; *Lewiston v. Proctor*, 27 Ill. 414; *Hartford v. N. Y. & N. E. R. Co.*, 59 Conn. 250, 22 Atl. Rep. 37; *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86.

⁶ *Grube v. Nichols*, 36 Ill. 92; *Champlin v. Morgan*, 20 Ill. 181; *Brockhausen v. Bochland*, 137 Ill. 547, 27 N. E. Rep. 458; *Shelby v. State*, 10 Humph. 165; *Warner v. Holyoke*, 112 Mass. 362; *Pope v. Devereux*, 5 Gray, 409; *Hobart v. Plymouth County*, 100 Mass. 159; *Goodwin v. Marblehead*, 1 Allen, 37; *Lyle v. Lesia*, 64 Mich. 16, 31 N. W. Rep. 273; *Horey v. Haverstraw*, 124 N. Y. 273, 26 N. E. Rep. 532. See, however, *Kelly Nail & I. Co. v. Lawrence Furnace Co.*, 46 Ohio St. 544, 5 L. R. A. 652, 22 N. E. Rep. 639.

⁷ *Flick's Estate*, 6 Kulp, 329; *Grube v. Nichols*, 36 Ill. 92; *Brockhausen v. Bochland*, 137 Ill. 547, 27 N. E. Rep. 458; *Witter v. Damitz*, 81 Wis. 385, 51 N. W. Rep. 575.

539. A mere encroachment upon a highway by an abutting owner is not sufficient to divest the rights of the public. The fact that an adjoining landowner, over whose land one-half of a highway has been laid, has encroached upon it with a fence or by cultivation and use, does not lessen the right of the public to use the entire width of the highway when the exigencies of public travel make it necessary.¹ Such encroachment may not be adverse or inconsistent with the public easement.²

An abandonment of a portion of a highway is not shown in case the public travel is confined to a road-bed on one side of a road sixty feet wide, and the abutting owners have fenced in the part not used and have cultivated it; or in case the road-bed is in the center of the road and the adjoining proprietors have fenced in the portions of the road on both sides of the road-bed and used such portions for sowing grain or for pasturing cattle.³

Where the public are entitled to an easement in land, either as a highway, a public landing-place or a common, the town or city in which the premises are situated has no authority to bind the public in regard to the extent of such easement by a submission to arbitration.⁴

540. A mode of vacating or discontinuing highways is provided for by statute. The Legislature has full power over streets and highways and may invest municipal corporations and authorities with the power to discontinue them.⁵

¹ Webb v. Butler County, 52 Kan. 375, 34 Pac. Rep. 973; Pillsbury v. Brown, 82 Me. 450, 19 Atl. Rep. 858; Driggs v. Phillips, 103 N. Y. 77, 8 N. E. Rep. 514; Woodruff v. Paddock, 56 Hun, 288; Humphreys v. Woodstown, 48 N. J. L. 588, 595, 7 Atl. Rep. 301; Schmidt v. Draper (Ind.), 36 N. E. Rep. 709; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Brooks v. Riding, 46 Ind. 15; Hamilton v. State, 106 Ind. 361, 7 N. E. Rep. 9; Louisiana Ice Mfg. Co. v. New Orleans, 43 La. Ann. 217, 9 So. Rep. 21; Commonwealth v. Moorehead, 118 Pa. St. 344, 12 Atl. Rep. 424; Kittaning Academy v. Brown, 41 Pa. St. 269; Kopf v. Utter, 101 Pa. St. 27.

² Lane v. Kennedy, 13 Ohio St. 42; Fox v. Hart, 11 Ohio, 414; Carter v. La Grange, 60 Tex. 636.

³ Southern Pac. R. Co. v. Ferris, 93 Cal. 263, 28 Pac. Rep. 828; Watkins v. Lynch, 71 Cal. 21, 11 Pac. Rep. 808.

⁴ State v. Peckham, 9 R. I. 1.

⁵ Meyer v. Teutopolis, 131 Ill. 552, 23 N. E. Rep. 651; Pillsbury v. Augusta, 79 Me. 71, 8 Atl. Rep. 150; Cooper v. Detroit, 42 Mich. 584, 4 N. W. Rep. 262; State v. Morse, 50 N. H. 9; Brook v. Horton, 68 Cal. 554, 10 Pac. Rep. 204; Heller v. Atchison, T. & S. F. R. Co., 28 Kan. 625; Gerhard v. Seekonk Riv. Bridge Com'rs, 15 R. I. 334, 5 Atl. Rep. 199; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am.

In some States where the rights of the public in highways cannot be lost by adverse possession, these rights can be affected and the public ways can be vacated only in the mode prescribed by statute.¹

541. Whether a public way has been discontinued so as to defeat the right of the public to use it is a question of fact. It is competent to show in proof of this issue that the alleged way had been shut up, the land enclosed by permanent fences or walls and occupied or improved for purposes inconsistent with its use as a public way, for a long series of years; and to show any other fact sufficient to found a legal presumption upon, that the way had been discontinued by competent authority. "Such a presumption would stand on the same grounds as that of a non-appearing grant, or a lost record, and if properly supported by evidence would justify the jury in inferring that whatever was necessary to give legal effect and operation to a discontinuance of the way was rightly done."²

542. Whether a highway can be discontinued without the consent of the abutting owners or compensation made to them for the loss of the easement, is a question upon which there is a conflict of authority. If the easement is essential as a means of using and enjoying the abutting property, it would seem that a discontinuance of the highway would be a special injury to the owner, for which he would be entitled to compensation.³ The discontinuance of the highway would be a "taking" of his property for which he has a

Rep. 70; *Fearing v. Irwin*, 55 N. Y. 486; *Coster v. New York*, 43 N. Y. 399; *Paul v. Carver*, 26 Pa. St. 223, 67 Am. Dec. 413; *McGee's App.* 114 Pa. St. 470, 8 Atl. Rep. 237; *Whitsett v. Union Depot & R. Co.*, 10 Colo. 243, 15 Pac. Rep. 339; *State v. Huggins*, 47 Ind. 586; *Gray v. Iowa Land Co.*, 26 Iowa, 387; *Kimball v. Kenosha*, 4 Wis. 321.

¹ *Miller v. Corinna*, 42 Minn. 391, 44 N. W. Rep. 127; *Amsbey v. Hinds*, 46 Barb. 622.

² *Holt v. Sargent*, 15 Gray, 97, 101, per Bigelow, J. And see *Larson v. Fitzgerald*, 87 Iowa, 402, 54 N. W. Rep. 441; *Pope v. Devereux*, 5 Gray, 409; *Lathrop v. Central Iowa R. Co.*, 69 Iowa, 105, 28 N. W. Rep. 465; *Brockhausen v. Bochland*, 137 Ill. 547, 27

N. E. Rep. 458, affirming 36 Ill. App. 224.

³ *Cincinnati v. White*, 6 Pet. 431; *Indianapolis, B. & W. West R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Butterworth v. Bartlett*, 50 Ind. 537; *Cosby v. Owensville & R. R. Co.*, 10 Bush, 288; *Elizabethtown, L. & Big Sandy R. Co. v. Combs*, 10 Bush, 382, 19 Am. Rep. 67; *Transylvania University v. Lexington*, 3 B. Mon. 25, 27, 38 Am. Dec. 173; *Pearsall v. Eaton County*, 74 Mich. 558, 42 N. W. Rep. 77.

In *Massachusetts* the statutes provide for damages suffered either in laying out, altering, or discontinuing any highway. P. S. 1882, ch. 49, § 14; *Hawkins v. Berkshire County*, 2 Allen, 254.

constitutional right to compensation. "The term 'taking' should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto. In either of these cases it is a taking within the meaning of the provision of the Constitution."¹

543. No private action can be maintained for the abandonment, alienation or obstruction of a public way unless an injury to individual rights is shown which is not an injury suffered, in common with the general public.² The reasons for this rule are stated in an early case as follows: "Resolved, that the plaintiff cannot have this action, because the ground of it is for a common nuisance, for which an action will not lie, unless there is some special damage alleged, or where the party grieved can have no other remedy; but in this case the plaintiff had not declared upon any particular damage, but generally, that he had lost the liberty of the passage, etc., and therefore this action will not lie; and chiefly to avoid multiplicity of actions; for by the same reason that it may be brought by the plaintiff it may be maintainable by every person passing that way."³

One who has title to land occupied by a public highway cannot maintain ejectment against another unless he shows that the other

¹ Pearsall v. Eaton County, 74 Mich. 558, 42 N. Y. Rep. 77, per Sherwood, C. J.

² Aldrich v. Minneapolis (Minn.), 53 N. W. Rep. 1072; Jacksonville, T. & K. W. R. v. Thompson, 34 Fla. 346, 350, Lidden, C. J., 16 So. Rep. 290, 26 L. R. A. 410; Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123; Dodge v. Pennsylvania R. Co., 43 N. J. Eq. 351, 11 Atl. Rep. 751; Hobson v. Philadelphia, 155 Pa. St. 131, 25 Atl. Rep. 1046; Turner v. Williams, 76 Mo. 617; Storm v. Barger, 43 Ill. App. 173; Gilbert v. Greeley, S. L. & P. Ry. Co., 13 Colo. 501, 22 Pac. Rep. 814; Seeley v. Bishop, 19 Conn. 128; O'Brien v. Norwich & W.

R. Co., 17 Conn. 372; Shaubut v. St. Paul & Sioux City R. Co., 21 Minn. 502; Dawson v. St. Paul Fire & Marine Ins. Co., 15 Minn. 136, 2 Am. Rep. 109; Rochette v. Chicago Mil. & St. Paul R. Co., 32 Minn. 201, 20 N. W. Rep. 140; Griffin v. Sanbornton, 44 N. H. 246; Aram v. Schallenberger, 41 Cal. 449; Rude v. St. Louis, 93 Mo. 408, 6 S. W. Rep. 257; Stout v. Noblesville & E. G. Road Co., 83 Ind. 466; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Enos v. Hamilton, 27 Wis. 256; Carpenter v. Mann, 17 Wis. 155.

³ Paine v. Partrich, Carthew's Rep. 191, 193. See also Winterbottom v. Lord Derby, L. R. 2 Exch. 316.

has taken exclusive possession or has imposed upon the land some burden inconsistent with the public easement.¹

544. A dedication of a way to the public does not confer any private easement. There is no private right of action for an interference with the public right of way unless the party has suffered private damage.² "There is no doubt as to the general rules of law upon this subject. An individual cannot maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public. The only remedy is by indictment or other public prosecution. But if, by reason of a public nuisance, an individual sustains peculiar injury, differing in kind, and not merely in degree or extent, from that which the general public sustains from the same cause, he may recover damages in a private suit for such peculiar injury. The difficulty usually is in applying these rules, and determining what injuries are peculiar and different in kind from the common public injury."³

A permanent obstruction of a public way is a public nuisance, the continuance of which may be enjoined in equity at the suit of the municipal corporation in which the way is situated, or the obstruction may otherwise be abated as a nuisance.⁴

545. A deed of a right of way, subject to the right of the public to use it, is held to amount to a reservation of the use of it by the grantor, so that he may maintain trespass against one who obstructs the way. Two adjoining landowners conveyed to a third, whose land lay back of theirs, a strip of land one rod wide on each side of the dividing line of their respective farms, to enable the grantee to reach the highway, subject to the right of the public to the use of said granted premises. In a suit by one of the grantors against the

¹ Westlake v. Koch, 134 N. Y. 58, 31 N. E. Rep. 321; Reformed Church v. Schoolcraft, 65 N. Y. 134, 150; Wager v. Troy Union R. Co., 25 N. Y. 526.

² Pearson v. Allen, 151 Mass. 79, 23 N. E. Rep. 731; Breed v. Lynn, 126 Mass. 367, 370; Thayer v. New Bedford Railroad, 125 Mass. 253, 257 Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470; Geer v. Fleming, 110 Mass. 39; Brainard v. Connecticut River R. Co., 7 Cush. 506, 510; Smith v. Boston, 7 Cush. 254, 255; Willard v. Cambridge, 3 Allen, 574; Hartshorn v.

South Reading, 3 Allen, 501; Hines v. Johnston, 95 Ga. 629, 652, 23 S. E. Rep. 470.

³ Brayton v. Fall River, 113 Mass. 218, 227, 18 Am. Rep. 470, per Morton, J. And see Fall River Iron Works Co. v. Old Colony & Fall River R. Co., 5 Allen, 221; Willard v. Cambridge, 3 Allen, 574; Brightman v. Fairhaven, 7 Gray, 271; Blood v. Nashua & L. R. Co., 2 Gray, 137, 61 Am. Dec. 444.

⁴ Reed v. Birmingham, 92 Ala. 339, 9 So. Rep. 161.

other for obstructing the right of way so granted, it was held that it was not necessary that the town should lay out a public highway over the granted premises before plaintiffs could avail themselves of their free use, which right was secured to them under the deed without any action by the township, the deed itself limiting the purpose for which the land could be used to a public way.¹

546. But if an obstruction, placed in a highway, causes a special and peculiar injury to an individual which is not common to all persons using the highway, as where it interferes with access to his land, he may maintain a private action for damages or an action for the abatement of the nuisance.² The injury in such case must be peculiar in kind and differ not merely in degree and extent from that which the general public sustains from the same cause.³

An alley opened and established or recognized by proper municipal authority or by public use is a public way.⁴ But an alley is intended primarily as a local accommodation for a limited neighborhood. If, therefore, the alley is obstructed or discontinued, the persons for whose use it was primarily established are injured in a special way. "Hence a claim made by a member of that limited neighborhood is not open to the objection that his injury is of a like character to that which any member of the community is subjected, differing only in degree."⁵

¹ Bane v. Bean, 63 Mich. 652, 30 N. W. Rep. 373.

² Chichester v. Lethbridge, Willes, 71; Wilkes v. Hungerford Market Co., 2 Bing. N. R. 281; Fritz v. Hobson, 14 Ch. D. 542; Corning v. Lowerre, 6 Johns. Ch. 439; Flynn v. Taylor, 127 N. Y. 596, 28 N. E. Rep. 418, 14 L. R. A. 556; Smith v. Putnam, 62 N. H. 369, 28 N. E. Rep. 418, Ross v. Thompson, 78 Ind. 90; Autenrieth v. St. Louis & S. F. R. Co., 36 Mo. App. 254, 260.

³ Brayton v. Fall River, 113 Mass. 218, 227, 18 Am. Rep. 470; Willard v. Cambridge, 3 Allen, 574; East St. Louis v. O'Flynn, 119 Ill. 200, 59 Am. Rep. 795; Stout v. Noblesville & E. G. Road Co., 83 Ind. 466; Knox v. New York, 55 Barb. 404; Clark v. Saybrook, 21 Conn. 313; Mahler v. Brumder, 92 Wis. 477, 66 N. W. Rep. 502, 503, 31 L.

R. A. 695; Evans v. Chicago, St. P. M. & O. R. Co., 86 Wis. 597, 603, 57 N. W. Rep. 354; Hay v. Weber, 79 Wis. 587, 591, 48 N. W. Rep. 859; Zettel v. West Bend, 79 Wis. 316, 48 N. W. Rep. 379; Carpenter v. Mann, 17 Wis. 155; Helm v. McClure, 107 Cal. 199, 40 Pac. Rep. 437; Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. Rep. 1106; Rude v. St. Louis, 93 Mo. 408, 6 S. W. Rep. 257; Ferrenbach v. Turner, 86 Mo. 416, 56 Am. Rep. 437; Lackland v. North Mo. R. Co., 31 Mo. 180; Ellsworth v. Chickasaw County, 40 Iowa, 571.

⁴ Bogard v. O'Brien (Ky.) 20 S. W. Rep. 1097; Chicago v. Sawyer (Ill.) 46 N. E. Rep. 759; Bannon v. Murphy (Ky.) 38 S. W. Rep. 889; Gargan v. Louisville, N. A. & C. R. Co., 89 Ky. 212, 12 S. W. Rep. 259.

⁵ Horton v. Williams, 99 Mich. 423,

547. An obstruction of a street that prevents the owner of an abutting lot from having free access from the street to his land is a damage to him, different in kind from that suffered by the public at large, and he may maintain an action in his own name against the person causing such obstruction.¹ "It is settled law that the owner of a lot abutting upon a street may have a peculiar and distinct interest in the easement in the street in front of his lot. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress and egress to and from his lot. This is an interest distinct from that possessed by the general public, and is a right appendant to the lot and the improvements thereon. Such means of ingress and egress are as much property as the lot itself. * * * The location and operation of a railroad upon a public highway may occasion incidental inconvenience to an abutting landowner, but until the road cuts off or materially interrupts his means of access to his property, or imposes some additional burden on his soil, his injury is the same in kind as that which the community in general suffers. Injuries which result from the careful construction and operation of a railroad on the land of another are common to all those whose lands are in close proximity to such road, and for such injuries there can be no recovery in the absence of a statute entitling the owner to maintain such action."²

427, per McGrath, C. J., 58 N. W. Rep. 369; Kimball v. Homan, 74 Mich. 699, 42 N. W. Rep. 167; Goss v. Highway Commissioner, 63 Mich. 608, 30 N. W. Rep. 197; Bagley v. People, 43 Mich. 355, 5 N. W. Rep. 415.

¹ Schulte v. Northern Pac. T. Co., 50 Cal. 592; Bannon v. Murphy (Ky.) 38 S. W. Rep. 889; Gargan v. Louisville, N. A. & C. R. Co., 89 Ky. 212, 12 S. W. Rep. 259; Selden v. Jacksonville, 28 Fla. 558, 10 So. Rep. 457, 14 L. R. A. 370; Decker v. Evansville, S. & N. R. Co., 133 Ind. 493, 33 N. E. Rep. 349; Fasson v. Landrey (Ind.) 24 N. E. Rep. 96; Indiana, B. & W. R. Co. v. Eberle, 110 Ind. 542, 11 N. E. Rep. 467; Harding v. Cowgar, 127 Ind. 245, 26 N. E. Rep. 799; Powell v. Bunger, 91 Ind.

64; Dantzer v. Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. Rep. 223, 50 Am. St. Rep. 343; Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 530; Aldrich v. Minneapolis (Minn.) 53 N. W. Rep. 1072; Barnum v. Transfer R. Co., 33 Minn. 365, 23 N. W. Rep. 538; Brakken v. Minn. R. Co., 29 Minn. 41, 11 N. W. Rep. 124; Hayes v. Chicago, St. P., M. & O. R. Co., 46 Minn. 349, 49 N. W. Rep. 61; Leavenworth, N. & S. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. Rep. 297; Evans v. Chicago, St. P., M. & O. R. Co., 86 Wis. 597, 57 N. W. Rep. 354, 39 Am. St. Rep. 908.

² Decker v. Evansville, S. & N. R. Co., 133 Ind. 493, 496, 497, per Coffey, C. J.

548. This rule applies although the fee of the street is in the municipality. "It is undoubtedly the prevailing doctrine of American jurisprudence that the owner of a lot abutting on a city street, the fee of which is in the municipality, has, by virtue of proximity special and peculiar rights, facilities and franchises in the street, not common to citizens at large, in the nature of easements therein, constituting property, of which he cannot be deprived by the Legislature or municipality, or by both combined, without compensation."¹

The abutting owners have an easement in a street in front of their property, although the fee of the street is in the municipality and this easement is a property right of which they cannot be deprived without just compensation. While, therefore, the Legislature may direct the closing of a street and may empower the municipality to discontinue its use as such, this power is subject to the constitutional prohibition, and it may not be exercised so as to deprive an abutting owner of the access to his premises furnished by the street, without making compensation; at least unless there is provided or left for him other means of access.²

549. The discontinuance of a highway by legislative or municipal authority, which prevents access to the property of an abutting owner, is a taking of the property for which he is entitled to compensation under the constitutional provision that property cannot be taken for public use without compensation.³

¹ Kane v. New York El. R. Co., 125 N. Y. 164, 180, 26 N. E. Rep. 278, per Andrews, J., citing Crawford v. Delaware, 7 Ohio St. 459; Cincinnati & Spring Grove Ave. St. R. Co. v. Cummins, 14 Ohio St. 523; Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush, 667; Lackland v. N. M. R. Co., 31 Mo. 180; South Carolina R. Co. v. Steiner, 44 Ga. 546; Central Branch U. P. R. Co. v. Twine, 23 Kan. 585, 33 Am. Rep. 203; Central Branch U. P. R. Co. v. Andrews, 30 Kan. 590, 2 Pac. Rep. 677; Theobald v. Louisville, N. O. & T. R. Co., 66 Miss. 279, 6 So. Rep. 230; Burlington & M. R. Co. v. Reinhackle, 15 Neb. 279, 18 N. W. Rep. 69; Haynes v. Thomas, 7 Ind. 38; Rensselaer v. Leopold, 106 Ind. 29, 5 N. E. Rep. 761.

² Egerer v. N. Y. C. & H. River R. Co., 130 N. Y. 108, 29 N. E. Rep. 95, 14 L. R. A. 381.

³ Cincinnati v. White, 6 Pet. 431; Gebhardt v. Reeves, 75 Ill. 301; Meyer v. Teutopolis, 131 Ill. 552, 23 N. E. Rep. 651; Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Cook v. Quick, 127 Ind. 477, 26 N. E. Rep. 1007; Butterworth v. Bartlett, 50 Ind. 537; State v. Berdett, 73 Ind. 185, 38 Am. Rep. 117; Pearsall v. Eaton County, 74 Mich. 558, 4 L. R. A. 193, 42 N. W. Rep. 77; Moose v. Carson, 104 N. C. 431, 10 S. E. Rep. 689, 7 L. R. A. 548; Bannon v. Rohmeiser, 90 Ky. 48; Transylvania University v. Lexington, 3 B. Mon. 27, 38 Am. Dec. 173; Ferrenbach v. Turner, 86 Mo. 416; Heard

There are, however, adjudications to the effect that the abutting owner is entitled to no damages upon the discontinuance of the highway, although access to his property is thereby cut off.¹ It is said that "a public road belongs to nobody but the State; and when the government sees proper to vacate it, the consequential loss, if there be any, must be borne by those who suffer it, just as they would bear what might result from a refusal to make it in the first place."²

550. But one cannot recover damages for the closing of a street upon which his property does not abut, though it is in proximity to it, nor for the closing of a portion of the street upon which his land abuts at a distance from it, not preventing his access to his land; for in such case there is no physical interference with his property, nor is there any right or easement connected therewith, or annexed thereto, affected. In such case he suffers no injury which is special or peculiar to him.³ The discontinuance of a part of a street in a city is not a ground of action by an owner of land on another street, into which, opposite his land, the part of the street discontinued runs obliquely, if the means of access to his estate remain ample, although its money value is diminished by the diversion of travel, and it is immaterial that a small point of land, of which he owns the fee subject to the public right of way, touches the discontinued part of the street.⁴ If, however, all access to

v. Brooklyn, 60 N. Y. 242; Knight v. Heaton, 22 Vt. 480.

¹ Barr v. Oskaloosa, 45 Iowa, 275; Brady v. Skinkle, 40 Iowa, 576; Ellsworth v. Chicasaw Co., 40 Iowa, 571; Grove v. Allen, 92 Iowa, 519; McGee's App., 114 Pa. St. 470; Paul v. Carver, 24 Pa. St. 207, 211, 64 Am. Dec. 649; Mercer v. Pittsburgh, F. W. & C. R. Co., 36 Pa. St. 99.

² Paul v. Carver, *supra*, per Black, J.

³ Glasgow v. St. Louis, 107 Mo. 198, 17 S. W. Rep. 743; Kings County F. Ins. Co. v. Stevens, 101 N. Y. 411, 5 N. E. Rep. 353; American Bank Note Co. v. New York El. R. Co., 129 N. Y. 252, 29 N. E. Rep. 302; Uline v. New York Cent. & H. R. Co., 101 N. Y. 98, 4 N. E. Rep. 536; Moyer v. New York Cent. & H. R. Co., 88 N. Y. 351; Bellinger v.

New York Cent. R. Co., 23 N. Y. 42; Radcliffe v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Coster v. Albany, 43 N. Y. 399; State v. Elizabeth, 54 N. J. L. 462, 24 Atl. Rep. 495; Shaubut v. St. Paul & S. C. R. Co., 21 Minn. 502; Davis v. Hampshire County Com'rs, 153 Mass. 218, 11 L. R. A. 750, 26 N. E. Rep. 848; Smith v. Boston, 7 Cush. 254; Castle v. Berkshire County, 11 Gray, 26; East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. Rep. 395, 59 Am. Rep. 795; Gerhard v. Bridge Commissioners, 15 R. I. 334, 5 Atl. Rep. 199.

⁴ Stanwood v. Malden, 157 Mass. 17, 32 N. E. Rep. 702, 16 L. R. A. 591; Smith v. Boston, 7 Cush. 254; Jacksonville, T. & K. W. R. Co. v. Thompson, 34 Fla. 346, 16 So. Rep. 292, 26 L. R. A. 410; Buhl v. Fort Street U. D.

one's property is cut off by the discontinuance of a way, or by an obstruction of the way, not in front of his property, but near to it, he is entitled to compensation, for the injury is not the same in kind as that suffered by the general public.¹ If upon the closing of a highway there is another public way left open by which a property owner may have access to his property, he is not entitled to damages.²

551. An encroachment upon a public park may be enjoined in a suit by an individual whose property is injured by the encroachment; as, for instance, the owner of a dwelling-house and land fronting on a common or public park can maintain a bill for an injunction against his neighbor who seeks to destroy the common by enclosing a large part of it for his own use; for the reason that the complainant's property is greatly enhanced in value by its situation, fronting the common, and would be greatly injured by the encroachment upon the common. He is not a mere volunteer, assuming to protect the rights of the public, but a party aggrieved, who is seeking to protect his private interests.³

552. When a highway is abandoned as such the land freed of the public incumbrance is restored to the abutting proprietors who owned the fee of the land subject to the public easement.⁴ Under

Co., 98 Mich. 596, 57 N. W. Rep. 829, 23 L. R. A. 392.

¹ *Brakken v. Minneapolis & St. L. R. Co.*, 29 Minn. 41, 11 N. W. Rep. 124.

² *Fearing v. Irwin*, 55 N. Y. 486; *Coster v. Albany*, 43 N. Y. 399.

³ *Wheeler v. Bedford*, 54 Conn. 244, 7 Atl. Rep. 22; *Brown v. Manning*, 6 Ohio, 298, 27 Am. Dec. 255; *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80.

⁴ *Harris v. Elliott*, 10 Pet. 25; *Barclay v. Howell*, 6 Pet. 498; *Banks v. Ogden*, 2 Wall. 57.

California: *Bigelow v. Ballerino* (Cal.) 41 Pac. Rep. 14.

Connecticut: *Benham v. Potter*, 52 Conn. 248.

Illinois: *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. Rep. 373; *Meyer v. Teutopolis*, 131 Ill. 552, 23 N. E. Rep. 651; *Hamilton v. Chicago, B. & O. R.*

Co., 124 Ill. 235, 15 N. E. Rep. 854; *Gebhardt v. Reeves*, 75 Ill. 301; *St. John v. Quitzwog*, 72 Ill. 334; *Hunter v. Middleton*, 13 Ill. 50.

Indiana: *Jeffersonville M. & I. R. Co. v. O'Connor*, 37 Ind. 95.

Iowa: *Brady v. Shinkle*, 40 Iowa, 576; *Day v. Schroeder*, 46 Iowa, 546.

Kansas: *Showalter v. Southern Kan. R. Co.*, 49 Kan. 421, 32 Pac. Rep. 42; *Challis v. Atchison Union Depot & R. Co.*, 45 Kan. 398, 25 Pac. Rep. 894; *Atchison, T. & S. F. R. Co. v. Patch*, 28 Kan. 470.

Kentucky: *West Covington v. Freking*, 8 Bush, 121.

Massachusetts: *Alden v. Murdock*, 13 Mass. 256; *Parker v. Framingham*, 8 Met. 260; *Fairfield v. Williams*, 4 Mass. 427.

Minnesota: *Lamm v. Chic. St. P. M. & O. R. Co.*, 45 Minn. 71, 10 L. R. A. 268, 47 N. W. Rep. 455.

a common-law dedication the fee or legal title of the land composing a highway remains in the owner making the dedication, subject only to the public easement, and upon the conveyance of the abutting land the title in fee to the center of the highway passes to the grantee, subject to the right of the public to use the same as a highway.¹ Under a statutory dedication the fee passes to the municipal corporation,² and upon a discontinuance or abandonment of the highway the title reverts to the original owner who dedicated the land to the public, and not necessarily to the abutting owner.³

In like manner when land dedicated to the public as a common, a park or burying-ground, or for any other public use, by a conveyance in fee, is abandoned for such use, it reverts to the dedicator or his representatives.⁴

The easement which the public has in a highway does not merge in the fee of the servient estate when this is acquired by the State, but the State holds it subject to the servitude of the public way.⁵

Were a canal was located and constructed along one side of a

Mississippi: *Nicholson v. Stockett*, Walker, 67.

Nebraska: *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361, 54 N. W. Rep. 557.

New York: *Heard v. Brooklyn*, 60 N. Y. 242; *Wallace v. Fee*, 50 N. Y. 694; *Wheeler v. Clark*, 58 N. Y. 267; *Dunham v. Williams*, 36 Barb. 136; *Hooker v. Utica & M. Turnp. Road Co.*, 12 Wend. 371; *Van Amringe v. Barnett*, 8 Bosw. 357, 372; *Flick's Estate*, 6 Kulp, 329.

Ohio: *Stevens v. Shannon*, 6 Ohio C. C. 142.

Pennsylvania: *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649; *Cox v. Freedley*, 33 Pa. St. 124.

Vermont: *Pettibone v. Purdy*, 7 Vt. 514.

Wisconsin: *Kimball v. Kenosha*, 4 Wis. 321; *Goodall v. Milwaukee*, 5 Wis. 32; *Milwaukee v. Milwaukee & B. R. Co.*, 7 Wis. 85; *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609, 80 Am. Dec. 791; *Weisbrod v. Chic. & N. W. R. Co.*, 18 Wis. 35, 86 Am. Dec. 743; *Hegar v. Chic. & N. W. R. Co.*, 26 Wis. 624;

Burbach v. Schweinler, 56 Wis. 386, 14 N. W. Rep. 449.

By the civil law, upon an abandonment of a highway the title remains in the sovereignty. *Mitchell v. Bass*, 33 Tex. 259.

¹ See §§ 226, 431. *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. Rep. 373; *Hamilton v. Chicago, B. & Q. R. Co.*, 124 Ill. 235, 15 N. E. Rep. 854.

² §§ 424, 447.

³ *Wirt v. McEnery*, 21 Fed. Rep. 233; *Canal Trustees v. Havens*, 11 Ill. 554; *Hyde Park v. Borden*, 94 Ill. 26; *Helm v. Webster*, 85 Ill. 116; *Gebhardt v. Reeves*, 75 Ill. 301. But that the land in such case joins to the adjacent lot-owner, see *Day v. Schroeder*, 46 Iowa, 546; *Atchison, T. & S. F. R. Co. v. Patch*, 28 Kan. 470; *Stevens v. Shannon*, 6 Ohio C. C. 142.

⁴ *Mahonning County v. Young*, 8 C. C. A. 27, 59 Fed. Rep. 96; *Board of Education v. Edson*, 18 Ohio St. 221, 226; *Zinc Co. v. La Salle*, 117 Ill. 411, 8 N. E. Rep. 81.

⁵ *People v. Marin County*, 103 Cal. 223, 37 Pac. Rep. 203, 26 L. R. A. 659.

highway and land was taken upon the opposite side for a substitute highway, and subsequently a railroad was located along the bank of the canal which was abandoned, and still later the railroad company abandoned the use of the canal bank for its track, and released its interests in the old highway to the town, it was held that the adjoining owner, holding the fee of the land occupied by the original highway, which ceased to be a highway when the substitute highway was established, upon the construction of the canal continued to own the fee, subject only to the easement of the canal; and that when the canal was abandoned and the railroad track removed, the land freed from the easement of the canal and the easement of the railroad became the unincumbered property of the adjoining owner.¹

¹ Benham v. Potter, 52 Conn. 248.

CHAPTER XIII.

LIGHT AND AIR.

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| I. By Express Grant or Covenant, 553-556. | III. By Implied Grant in Case of Lease, 570-572. |
| II. By Implied Grant or Reservation, 557-569. | IV. By Prescription, 573-584. |

I. *By Express Grant or Covenant.*

553. An easement of light or air may exist by express grant or reservation, or by an express covenant or agreement.¹ In most of the American States this easement can be created in no other way; for there is no implied grant of this easement over the grantor's other land upon a conveyance of a part, except in a few States; and the easement can be acquired by prescription in only one State.

A limitation in a deed of part of an estate, that no building shall be erected thereon which shall darken any window within three feet of the boundary line of the grantor's other land, is in the nature of an exception or reservation to the grantor of an incorporeal right in the land granted, and the reservation being for the benefit of the adjoining part of the estate not conveyed, such right is in the nature of an equitable easement appurtenant to that part.² This equitable easement in favor of the grantor's other land may be enforced in equity by the owner of such land at the time of any breach of such restrictive covenant.³

A reservation of an easement of light or air may be defeated by the foreclosure of a prior lien. Thus, the owner of a lot of land subject to a mortgage conveyed the same, reserving an easement therein for light and air to the windows of the grantor's adjoining

¹ Dalton v. Angus, 6 App. Cas. 740, 1, 15 Atl. Rep. 399; Weigmann v. Jones, 163 Pa. St. 330, 30 Atl. Rep. 198.
² Tinker v. Forbes, 136 Ill. 221, 26 N. E. Rep. 503. And see Ayling v. Kramer, 133 Mass. 12; Fuller v. Arms, 45 Vt. 400.
³ Ayling v. Kramer, 133 Mass. 12.

building. The grantee assumed the mortgage and afterwards conveyed the land through a third person to his wife, subject to the mortgage, which, however, the wife did not assume. The mortgage was foreclosed and the wife became the purchaser under the sale. In an action to restrain her from obstructing the light and air, it was held that under the foreclosure deed she took the absolute title unincumbered by the easement.¹

554. An easement of light or air may be created by covenant as well as by words of grant.² Thus where a deed contained a clause whereby the grantors "agree" that no building should be erected on this land adjoining the granted land nearer to the line of such land than four feet, it was held that the word "agree" must be read as meaning "grant;" and that, although there were no express words to the effect that the agreement was for the benefit of the land conveyed, it must be taken to be a covenant running with the land and binding upon subsequent purchasers.³

The owners of lots bounding on Pemberton Square, in Boston, mutually covenanted, among other things, that portions of some of the lots should not be built upon, or not built upon above a certain height; and afterwards the city took such lots for a site for the new court-house. It was held that easements of light, air, and prospect were created by the covenant, and that the city was liable in damages for their extinguishment.⁴ Mr. Justice Holmes, delivering the opinion of the court, said: "In order to attach the easement to the dominant estate, it is not necessary that it should be created at the moment when either the dominant or the servient estate is conveyed, if the purport of the deed is to create an easement for the benefit of the dominant estate."⁵ Of course, it does not matter that by the same deed numerous parties grant similar or reciprocal easements over, or in favor of, many parcels of land.⁶ Neither is it material that the indenture provides that a majority of three-fourths

¹ Christ Prot. Epis. Church v. Mack, 292, 10 N. E. Rep. 528; Lattimer v. 93 N. Y. 488. Livermore, 72 N. Y. 174.

² Ladd v. Boston, 151 Mass. 585, 24 N. E. Rep. 858, 21 Am. St. Rep. 481; ⁴ Ladd v. Boston, 151 Mass. 585, 588, 24 N. E. Rep. 858, 21 Am. St. Rep. 481.

Hogan v. Barry, 143 Mass. 538, 10 N. E. Rep. 253. ⁵ Louisville & Nashville R. Co. v. Koelle, 104 Ill. 455; Wetherell v. Brobst, 23 Iowa, 586, 591; Gale on Easements (6th ed.) 59.

⁶ Hogan v. Barry, 143 Mass. 538, 10 N. E. Rep. 253. And see White's Bank v. Nichols, 64 N. Y. 65, 73; Lahr v. Metropolitan E. R. Co., 104 N. Y. 268, ⁶ Tobey v. Moore, 130 Mass. 448; Beals v. Case, 138 Mass. 138, 140.

of the owners of the lots concerned may terminate the rights which it creates.”

555. There may be implied covenants against obstructing windows arising from the terms of a conveyance or agreement. If on a sale and conveyance of land adjoining a house to be built by the vendor upon his remaining land, it is mutually agreed that one of the outer walls of that house may stand wholly or partly within the verge of the land sold, and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, the purchaser cannot afterwards build upon the land sold so as to prevent or obstruct the access of light to those windows.¹

The owner of an estate upon which was a brick wall forming a boundary of three other estates covenanted with the owners of those estates that neither he nor his heirs or assigns would carry the wall any higher than it then was, and that in case the wall should be destroyed or taken down, “no wall or anything else to obstruct in the least degree the light and air shall ever be there erected higher than ten feet from the surface of the yards of said estates.” It was held that a grantee of such a covenantor could not build on his land next to such wall anything to obstruct light or air, more than that wall would obstruct it. “It is quite plain that the literal construction which is contended for could not have been in the minds of the parties to the covenant. Under that construction the covenantor might at once have erected a building or wall directly abutting upon the existing wall, and carried it up as high as he saw fit. Such a construction would lead to an absurd consequence. So far as light and air were concerned, there would have been no practical difference to the covenantees between such a structure and carrying up the existing wall. It cannot be supposed that this covenant was given and received with the intention of restricting the covenantor and his heirs and assigns from building a higher wall on the space then occupied by the existing wall, but leaving him at liberty to build as high as he pleased just inside that wall. The only question, then, is whether the words of the covenant will admit of a broader meaning. In our opinion they will. The instrument

¹ Russell v. Watts, 10 App. Cas. 590, ties as Palmer v. Fletcher, 1 Lev. 122; per Earl of Selborne, who added: “I Swansborough v. Coventry, 9 Bing. should have been prepared to so decide, 305; Compton v. Richards, 1 Price, even if there had been no such authori- 27.”

was in effect a grant of an easement;¹ and the words may be construed with a leaning against the grantor or covenantor, in order to carry out the obvious intention of the parties. That intention was that no wall or anything should be built to obstruct in the least degree the light or air above the height specified. Looking at the words with reference to this obvious intention, they mean that nothing shall be built on that lot next to the wall to obstruct light or air more than the existing wall, or such other wall as is described would obstruct them.”²

Where there is a general plan for erecting several buildings together, and the several parts and the internal arrangements are connected together for a common use and occupation, and simultaneous leases are made of each building, all the lessees and subsequent purchasers are bound by the terms of the agreements between the original lessor and his lessees. Though the leases contain no express reservation of the right to light, yet looking to the plans and the covenants and leases, subsequent mortgagees of separate buildings would by reasonable implication be precluded from interfering with the light in one of the buildings which looked out upon the buildings covered by the mortgages.³

Where land with warehouses was leased “with all lights, easements, advantages and appurtenances whatsoever thereto belonging or in anywise appertaining,” it was held that the use of the word “lights” among the general words in the lease created the ordinary right to light, as it is understood under the well-known easement of light. “The words ‘belonging or appertaining’ would, strictly speaking, apply to lights legally appertaining, which these lights are not. But it may be, having regard to the situation of these premises, which are described as being newly erected, a rather more extensive meaning would be put on the words ‘belonging or appertaining,’ and they might be held to include lights usually held and enjoyed. It appears to me unnecessary to decide that point because, under any circumstances, it is clear that the right to light as against the lessors, in respect of any premises which at the date of this deed belonged to the lessors, passed to the lessee, and it is quite clear that no greater right passed, even assuming that the words ‘lights belonging and appertaining’ did include the right to

¹ Citing *Bronson v. Coffin*, 108 Mass. 175, 180, 11 Am. Rep. 335; *Ladd v. Boston*, 151 Mass. 585, 24 N. E. Rep. 858.

² *Chase v. Walker*, 167 Mass. 293, 297, 45 N. E. Rep. 916, per Allen, J.

³ *Russell v. Watts*, 10 App. Cas. 590.

the entrance of light into all the windows then existing in the house, over the premises of the vendors; because it is quite clear that the word 'lights,' when used in general words in a conveyance, means the ordinary right of light as it is known and limited by the law, and no greater right."¹

556. A building restriction may create an equitable easement of light and air in favor of the lots adjoining that upon which the restriction is laid. This was held to be the case where an owner of three adjoining lots executed three deeds on the same day of the three lots to different persons, and the deed of the middle lot contained a covenant that the grantee would not erect any building on his lot running farther back than a certain number of feet from the street. The deeds of the other two lots did not refer to the building restriction, but they did recite the fact of the conveyance of the middle lot on the same day to the grantee mentioned in the deed. It was held that the restriction was in the nature of a covenant running with the land, and created an easement of light and air in favor of the adjoining lots which the owners of those lots might enforce.²

A condition in a deed that the grantor shall not erect any building more than one story high on his adjoining lot, so that the grantee "should not be incommoded in regard to light and air by any high building," does not confine the grantor to the precise height of a one-story building standing on the premises at the time the deed was executed; and hence the condition is not violated by the grantor in increasing the height of such one-story building by two feet, so as to make it uniform in height with the first floor of a building in front of it, giving him an increase of store room, rendered necessary by the growth of the town. "There is nothing in the language of the deed requiring such interpretation; "and, for the same reason that has induced this and courts generally of this country to reject the English rule as to prescriptive right to light and air, it should not be given. * * * It, therefore, should never be assumed, in absence of plain and unambiguous words to such effect, that parties contract in relation to sale or exchange of real property with sole regard to its present condition, and without

¹ Leech v. Schweder, L. R. 9 Ch. 463, 175 Pa. St. 327, 34 Atl. Rep. 663, 473, per Mellish, L. J. 177 Pa. St. 23, 35 Atl. Rep. 242. Also

² Muzzarelli v. Hulshizer, 163 Pa. St. 643, 30 Atl. Rep. 291; Landell v. Ham-

Lattimer v. Livermore, 72 N. Y. 174.

at all contemplating or providing for future changes and improvements that may take place in or around it.”¹

One who has stipulated under seal to pay a certain sum annually to the owner of adjoining land so long as the latter will refrain from erecting on his land buildings that may obstruct the windows of the former, is not relieved from the obligation to continue the payments by giving notice that the payments would cease, in case no provision for such notice formed a part of the agreement between the parties.²

II. *By Implied Grant or Reservation.*

557. There is no implied grant of the right to light or air over the grantor's other land adjoining the land conveyed. The grantor does not derogate from his grant by erecting a building which may obstruct the windows of his grantee; although the grantor conveyed a building having windows overlooking the land retained by him.³

The doctrine of an implied grant of an easement over the land retained by the grantor rests upon the maxims that a grantor cannot be allowed to derogate from his own grant, and that he is pre-

¹ *Hobson v. Cartwright*, 93 Ky. 368, 373, 20 S. W. Rep. 281, 282, per Lewis, J.

² *Trustees v. National State Bank* (N. J. L.), 29 Atl. Rep. 320.

³ *Connecticut*: *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. Rep. 939, 29 L. R. A. 582.

Georgia: *Turner v. Thompson*, 58 Ga. 268, 36 Am. Rep. 297.

Illinois: *Keating v. Springer*, 146 Ill. 481, 34 N. E. Rep. 805.

Indiana: *Keiper v. Klein*, 51 Ind. 316.

Iowa: *Morrison v. Marquardt*, 24 Iowa, 35, 92 Am. Dec. 444.

Maine: *White v. Bradley*, 66 Me. 254.

Massachusetts: *Christ Church v. Lazzezzolo*, 156 Mass. 89, 30 N. E. Rep. 471; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Randall v. Sanderson*, 111 Mass. 114; *Rogers v. Sawin*, 10 Gray, 316, 378; *Collier v. Pierce*, 7 Gray, 18, 66 Am. Dec. 453; *Brooks v.*

Reynolds, 106 Mass. 31. The cases to the contrary, *Story v. Odin*, 12 Mass. 157, 7 Am. Dec. 46, and *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161, are overruled.

New York: *Knabe v. Leveille*, 23 N. Y. S. 818; *Palmer v. Wetmore*, 2 Sandf. 316; *Myers v. Gemmel*, 10 Barb. 537; *Parker v. Foote*, 19 Wend. 309 315; *Doyle v. Lord*, 64 N. Y. 432, 439, 21 Am. Rep. 629; *Shipman v. Beers*, 2 Abb. N. C. 435. The dicta of *Selden, J.*, to the contrary in *Lampman v. Milks*; *Havens v. Klein*, 51 How. Pr. 82.

Ohio: *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379.

Pennsylvania: *Rennyson's Appeal*, 94 Pa. St. 147, 39 Am. Rep. 777; *Haverstick v. Sipe*, 33 Pa. St. 368; *Maynard v. Esher*, 17 Pa. St. 222, so far as contrary is not law.

West Virginia: *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629.

sumed to convey with the land granted whatever rights are necessary for the reasonable enjoyment of the thing conveyed, so far as the grantor has such rights in his possession. "The reasons upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment, are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed."¹ Chief Justice Dillon, in a leading case in Iowa, said: "As to light and air, I am free to say that I do not believe the rule, as applied to our situation and circumstances, a sound one, which holds that under any circumstances this right can, by implication, be burdened upon an adjoining estate, so as to prevent the owner thereof from building upon or improving it as he pleases."²

558. Upon the severance of an estate there is no implied grant of easements of light and air, as against a subsequent purchaser of the remaining portion, unless such purchaser has notice that the parties to the prior purchase intended to create and continue such an easement. "The policy upon which our registration laws as to conveyances of each estate is based would seem to make it essential that in order to claim such easement against such purchaser it must be of a character so evidently necessary to the reasonable enjoyment of the granted premises, so continuous in its nature, so plain, visible and open, so manifest from the situation and relation of the two tracts, as to fairly and clearly indicate to a prospective purchaser of the reserved portion, the intention of the parties to the previous sale that it should remain, and to make such purchaser chargeable with knowledge that the law based on justice, that equity founded on good conscience, would forbid him, in case of his

¹ Keats v. Hugo, 115 Mass. 204, 215,
15 Am. Rep. 80, per Gray, C. J.

² Morrison v. Marquardt, 24 Iowa, 35,
60, 92 Am. Dec. 444.

purchase, so to occupy the lot as to interfere with such easement.”¹ Upon the severance of an estate these easements are not implied from the nature and use of the structure existing upon either part at the time of the conveyance, or because light and air are needed for the convenient enjoyment of the property conveyed or that retained. “Surely, such an easement, uncertain in its extent and duration, without any written or record evidence of its existence, fettering estates and laying an embargo upon the hand of improvement which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts, and not demanded by any consideration of public policy — surely, such an easement should not be held to exist by mere implication, when such implication originates in no reasonable necessity.”²

559. The implication of a grant of light and air is not aided by a clause in the deed granting all rights, privileges and appurtenances belonging to the granted premises. A house contained three windows, one on each story, which were the only means of lighting the rooms in which they were placed, overlooking the land adjoining. The house and land having been owned by one person, some of the heirs conveyed to the others the house “and all the rights and privileges thereto belonging;” and on the same day all the heirs conveyed to a stranger the adjoining land with a covenant against incumbrances. It was held that the grantee of the house took no easement of light and air over the adjoining land.³

The case is quite different, however, when a building is conveyed with all the “lights,” easements, rights, privileges and appurtenances, to the same belonging or in any way appertaining; for the right to lights is expressly granted.⁴

560. There are, however, some cases which adopt the doctrine of implied grants of easements of light and air in a modified form, that is, in case these easements are a real necessity to the reasonable enjoyment of the building granted.⁵ It is held in these cases that

¹ Robinson v. Clapp, 65 Conn. 365, 114; Collier v. Pierce, 7 Gray, 18, 66 384, 32 Atl. Rep. 939, 29 L. R. A. 582, Am. Dec. 453.
per Fenn, J.

² Morrison v. Marquardt, 24 Iowa, 305. See § 555.

³ Morrison v. Marquardt, 24 Iowa, 35, 64, 92 Am. Dec. 444, per Dillon, C. J. And see Turner v. Thompson, 58 Ga. 268, 36 Am. Rep. 297.

⁴ Randall v. Sanderson, 111 Mass. 505; Morrison v. Marquardt, 24 Iowa, 35, 92 Am. Dec.

the grantor is estopped from obstructing the passage of light and air through windows in a building on that part of the premises which he has conveyed, if such windows are necessary for the reasonable enjoyment of the tenement sold; but if sufficient light and air can be derived from other windows already existing, or which the purchaser could conveniently open, to make the tenement reasonably useful and enjoyable, the grantor is not so estopped.¹

This modified doctrine is adopted in Pennsylvania in a case in which the court lay down the following rules: "1. No implication of a grant of the right to light and air arises upon a sale of one of two adjacent lots having a house upon it, with windows overlooking the land of the grantor. 2. The grantor, by such sale, is not estopped from improving his retained lot by building upon it, though his erection darkens the windows of his vendee, and excludes the access of light and air from such windows. 3. That the limitation of these two propositions depends upon the fact as to whether such windows are a real necessity for the enjoyment of the grantee's property. If they be, then the implication of the grant of an easement of light and air will be sustained; if they be not, or can be substituted at a reasonable cost, with a view to the purposes of the dominant tenement, then such implication will be denied and rejected. 4. The American doctrine as to light and air requires an express grant or agreement, unless a real and actual necessity exists to vest a dominant tenement with such right. 5. The doctrine of ancient lights is not recognized."²

561. In a few States the doctrine prevails that there is an implied grant of the easement of light and air over the grantor's other land adjoining the building conveyed, in case such easement is reasonably necessary to the enjoyment of the premises conveyed. This doctrine is declared to rest upon the principle that a man cannot be permitted to derogate from his own grant.³

The apparent and continuous quality of the enjoyment of light and air is such that upon a severance of the title the right passes by

444; *White v. Bradley*, 66 Me. 254; *Rennyson's Appeal*, 94 Pa. St. 147, 39 Am. Rep. 777; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629.

¹ *Turner v. Thompson*, 58 Ga. 268, 36 Am. Rep. 297.

² *Rennyson's App.*, 94 Pa. St. 147, 153, 39 Am. Rep. 777.

³ *Cleris v. Tieman*, 15 La. Ann. 316; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Cherry v. Stein*, 11 Md. 1; *Sutphen v. Therkelson*, 38 N. J. Eq. 318.

an implied grant or reservation, provided the enjoyment of the right is reasonably necessary to the beneficial use of the building granted or retained. As the law stands in New Jersey, the easement is implied not only in the case of a grant, but equally in case of a building retained.¹

562. Under this rule the enjoyment of light and air must be not only apparent and continuous but it must be reasonably necessary to the beneficial enjoyment of a building.²

Whether a window in a building is reasonably necessary to the beneficial enjoyment of the property depends upon the condition of the premises at the time of the severance of the title. The test of reasonable convenience in such case is whether the window was so useful to the business conducted in the building that it is reasonable to assume that its continued presence was in the mind of the parties, and influenced the purchaser in arriving at the amount of the consideration paid at the time of his purchase.³

563. In the English courts, moreover, the doctrine of an implied grant of light and air over the grantor's other land is recognized. Chief Justice Tindal says: "It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights."⁴ In a later case Mellish, L. J., said:

¹ Greer v. Van Meter (N. J. Eq.) 33 Atl. Rep. 794; Sutphen v. Therkelson, 38 N. J. Eq. 318. And yet in this State easements in light and air cannot be acquired by prescription. King v. Miller, 8 N. J. Eq. 559, 55 Am. Dec. 246; Hayden v. Dutcher, 31 N. J. Eq. 217.

² Greer v. Van Meter (N. J. Eq.) 33 Atl. Rep. 794.

³ Greer v. Van Meter (N. J. Eq.) 33 Atl. Rep. 794.

⁴ Swansborough v. Coventry, 9 Bing. 305. See also Coutts v. Gorham, Moo. & M. 396; Myers v. Catterson, 43 Ch. D. 470. In Palmer v. Fletcher, 1 Lev. 122, decided in 1675. "Case was brought for stopping of his lights.

The case was, a man erected a house on his own lands, and after sells the house to one, and the lands adjoining to another, who by putting piles of timber on the land, obstructed the lights of the house; and it was resolved, that although it be a new messuage, yet no person who claims the land by purchase under the builder, can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant." Chief Justice Holt, in 1705, referring to this early case in Tenant v. Goldwin, 2 Ld. Raym. 1089, 1093, said: "But if he had sold the vacant piece of ground and kept the house without reserving the

“It is perfectly established that if a man owns a house, and owns property of any other kind adjoining that house, and then either conveys the house in fee simple or demises it for a term of years to another person, a right to light unobstructed by anything to be erected on any land which at the time belonged to the grantor passes to the grantee.”¹

564. But easements of light and air cannot be acquired upon the severance of an estate by implied reservation.² This is in accordance with the general rule of law in regard to the implied reservation of easements.³

The Earl of Selborne, in a recent case before the House of Lords, said: “If a man entitled to a house with windows, however long enjoyed, sells and grants away the adjoining land without any condition, reservation or other form of contract which can operate restrictively against the grantee, he is not at liberty to derogate from his own grant so as to prevent any use, otherwise lawful, of the land granted, although the windows of his own house may be darkened thereby.”⁴

565. An owner of a building with windows fronting upon a public street has an implied right to light and air from the space occupied by the street; and therefore, if the light and air of such street is interfered with by any structure in the street, such as an elevated railroad, the owner is entitled to compensation in damages.⁵ This right was first established in the New York cases cited above, but is now sustained by decisions in several other States. A summary of the law is given by Chief Justice Gilfillan of Minnesota in a recent case, who says: “The conclusions arrived at are that the

benefit of the lights, the vendee might build against his house. But, in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights.”

¹ *Leech v. Schweder*, L. R. 9 Ch. 463, 472.

² *Russell v. Watts*, 10 App. Cas. 590; *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1093, per Chief Justice Holt.

³ See §§ 136-142.

⁴ *Russell v. Watts*, 10 App. Cas. 590, 596.

⁵ §§ 506-528. *Story v. New York El. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146;

Pond v. Metropolitan El. R. Co., 42 Hun, 567; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528; *Pratt v. Buffalo City R. Co.*, 19 Hun, 30; *Greene v. New York Cent. & H. R. Co.*, 65 How. Pr. 154; *Fifth Nat. Bank v. New York El. R. Co.*, 24 Fed. Rep. 114; *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252, 29 N. E. Rep. 302; *Dexter v. Tree*, 117 Ill. 532, 6 N. E. Rep. 506; *Field v. Barling*, 149 Ill. 556, 37 N. E. Rep. 850, 41 Am. St. Rep. 311; *Barnett v. Johnson*, 15 N. J. Eq. 481; *Dill v. Board of Education*, 47 N. J. Eq. 421, 20 Atl. Rep. 739.

owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right; that depriving him of, or interfering with, his enjoyment of the easement of any public use not a proper street use, is a taking of his property within the meaning of the Constitution; that appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use; that where, without his consent and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street; that the recovery should be limited to the damages caused by operating the railroad in front of plaintiff's lot, and ought not to include any that might have accrued from operating it on other parts of the street."¹

In a New Jersey case it was held that the Morris Canal being a public highway, the owner of land adjacent to it, had, as of common right, the privilege of receiving light and air from it; and that having a house built upon the line of the canal with windows facing the canal, the court would restrain the erection of a building over the canal, so as to close up the windows of such owner.²

In the absence of an express grant one is not entitled to a right of prospect or air over a park separated from his house by an intervening street, unless it affirmatively appears that the prospect and air were within the contemplation of the parties when the park was laid out or dedicated to public use.³ Thus, one whose land only cornered on a public square was held not to have any easement in the light and air coming over the square, and therefore could not complain because a portion of the square was occupied by a railroad company.⁴

¹ Adams v. Chic. B. & N. R. Co., 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493, 496, 12 Am. St. Rep. 644.

² Barnett v. Johnson, 15 N. J. Eq. 481.

³ Greene v. New York Cent. & H. R.

Co., 65 How. Pr. 154, 12 Abb. N. C. 124.

⁴ Drake v. Hudson River R. Co., 7 Barb. 508, affirmed in Greene v. New York Cent. & H. R. Co., 65 How. Pr. 154, 12 Abb. N. C. 124.

566. But no right to light and air is implied from a grant of land bounded upon an alley or private passage-way.¹ Such a private way may be built over, or bay-windows or other structures may be projected over it, if they do not interfere with its use as a passage-way. If, however, such a way is expressly declared to be "for light and air," it cannot be covered in whole or in part, nor can any structure be erected over it which shall interfere with this expressed purpose.²

Such also is the effect of a provision that the way shall not be "subject to have any fence or building erected therein;"³ and such is the effect of any terms of the grant, which, with surrounding circumstances, show that a passage-way is to be kept open like a street for light, air and prospect.⁴

567. Cases relating to the access of air are very different from those relating to the access of light, though the cases relating to light are frequently spoken of as cases of light and air. In a case relating to air, Lord Justice Bramwell said:⁵ "But there is this difference between the present claim and the claim to light. The right in that case is always limited to the particular window or aperture through which the light and air have had access; it is one, therefore, against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. Lord Wensleydale⁶ thought this a very strong thing as a great burden on the adjoining landowner. But here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land. * * * Where it has been said that there is a right to air, there is good ground for supposing that the wholesomeness of the air had been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place." In the same case Lord Justice

¹ *Dexter v. Tree*, 117 Ill. 532, 6 N. E. Rep. 506; *Burnham v. Nevins*, 144 Mass. 88, 10 N. E. Rep. 494; *Gerrish v. Shattuck*, 132 Mass. 235; *Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100; *Sutton v. Groll*, 42 N. J. Eq. 213, 5 Atl. Rep. 901.

² *Brooks v. Reynolds*, 106 Mass. 31.

³ *Schwoerer v. Boylston Market Assoc.*, 99 Mass. 285.

⁴ *Attorney-General v. Williams*, 140 Mass. 329, 2 N. E. Rep. 80, 3 N. E. Rep. 214; *Salisbury v. Andrews*, 128 Mass. 336.

⁵ *Bryant v. Lefever*, 4 C. P. D. 172, 178, 180.

⁶ See *Chasemore v. Richards*, 7 H. L. Cas. 349, 386.

Cotton said: "Cases to prevent, or to claim damages for, interference with ancient lights are frequently spoken of as cases of light and air, and the right relied on as a right to the access of light and air. But this is inaccurate. The cases, as a rule, relate solely to the interference with the access of light, and in no case has any injunction been granted to restrain interference with the access of air. It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbor's property has been enjoyed as of right for a sufficient period, a right by way of easement could be acquired. No such point is made in this case, and I am of opinion that a right by way of easement to the access of air over the general unlimited surface of a neighbor cannot be acquired by mere enjoyment."

It is declared also that in no case has an injunction been granted to restrain interference with the access of air.¹

One cannot acquire a right by way of easement to the access of air under a grant of land, expressed in general terms, except where such right is enjoyed through a definite aperture, in the nature of a window on the property granted, or through a definite channel over adjoining property.²

568. There is an implied grant of a right by way of easement to the access of air over the grantor's other land where the grant is for a specific purpose, and the grantor is under obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made. Where, therefore, a lease was granted in order that the land demised be used by the lessee for the purpose of carrying on the business of a timber merchant, and the lessee covenanted to carry on such business, it was held that the assigns of the lessor were not entitled to build upon adjoining property acquired by them from him, so as to interrupt the access of air to sheds upon the demised property used for drying timber, and to interfere with the carrying on of the business in ordinary course.³

569. Of course one has a right of action as for a nuisance for a pollution of the air so as to render it injurious to health, and he

¹ Bryant v. Lefever, 4 C. P. D. 172, 437; Harris v. De Pinna, 33 Ch. D. per Colton, L. J.; Harris v. De Pinna, 238.

33 Ch. D. 238, 250, per Chitty, J. ³ Aldin v. Latimer Clark [1894], 2 Ch.

² Aldin v. Latimer Clark [1894], 2 Ch. 437. And see Robinson v. Kilvert, 41 Ch. D. 88.

has a right of action, though the pollution is not injurious to health, but merely interferes with the complainant's reasonable use and enjoyment of his property so that its value is substantially impaired.¹ The owner of a dwelling-house is entitled to have the air in its natural state sufficiently pure for the comfortable enjoyment of it as a habitation; but he is not entitled to recover damages for the alleged nuisance unless he has actually sustained substantial damage, and the court will not interfere by injunction unless substantial damage is proved to have been sustained.²

III. *By Implied Grant in case of Lease.*

570. A right to light and air is frequently implied in favor of a lessee when it would not be implied in favor of a purchaser. One leased the first floor of a building in the city of New York for a store. In the rear was a yard attached to and exclusively appropriated for the use of the building, to which all the occupants had access through a hall running from the front to the rear of the building, and as the building was occupied when the plaintiff leased no tenant could dispense with it. The rear of the store received light necessary for the transaction of business therein, from windows opening into the yard. In holding that the lessor could, upon the facts found, be restrained from building in the yard, so as to obstruct the light, the Court of Appeals of New York, by Earl, J., said: "This conclusion is reached without any departure from what may be called the American doctrine as to light and air, as distinguished from the English common-law doctrine, and the law as laid down in the following authorities is fully recognized.³ Under these authorities, if the lessor had sold the store and lot upon which it stood, twenty-five feet by fifty-one, the grantee would have taken no right to light and air from the balance of the lot. In that case the grantor could have built upon the balance of the lot, and thus have darkened the windows in the store without violating any

¹ St. Helen's Smelting Co. v. Tipping, 11 H. L. C. 642; Vernon v. St. James, 16 Ch. D. 449; Walter v. Selfe, 4 De G. & Sm. 315; Crump v. Lambert, L. R. 3 Eq. 409; Churchill v. Burlington Water Co., (Iowa) 62 N. W. Rep. 646.

² St. Helen's Smelting Co. v. Tipping, 11 H. L. C. 642; Salvin v. North Brancepeth Coal Co., L. R. 9 Ch. 705; Dent v. Auction Mart Co., L. R. 2 Eq. 238.

³ Parker v. Foote, 19 Wend. 309, 315; Palmer v. Wetmore, 2 Sandf. 316; Myers v. Gemmel, 10 Barb. 537; Mul-len v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 379; Haverstick v. Sipe, 33 Pa. St. 368; Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80.

rights of the grantee. In this case, if the yard had not been part of the lot upon which the building was standing, and if it had not been appropriated to use with the building so as to pass as appurtenant thereto, so far as to give easements therein to the tenants of the building, the plaintiffs could not have complained of the acts of the defendants alleged in the complaint.”¹

In a recent case in Massachusetts the court refer to this New York case and approve it. In the case before the court the upper stories of a large building were demised to the plaintiffs by a lease which contained no express mention of an existing well or open space for light and air; but it was essential that the lessees should have the full use of the windows opening into this well to obtain the full enjoyment of the premises as leased. Before the expiration of the lease the defendant leased the whole building to another, subject to the unexpired lease, and the new lessees built in this well a chimney and a large electric-light plant which obstructed the light and interfered with the business of the plaintiffs. In a suit by them against their lessors to enjoin them from disturbing their quiet enjoyment of the premises, it was held that the plaintiffs had an implied grant or demise of a right to the light and air passing through the open space or well; and that as the time had passed when an injunction could properly be issued the case was retained for the assessment of damages. “It is true,” said the court, “that the doctrine of implied grants of easements or privileges connected with real estate is applied with some strictness in this Commonwealth; but in this case it might well be found, as it was found, that the right to light and air was necessary to the beneficial enjoyment of the demised premises. The open space was not accessible from the street. Its sole use, so far as the lessors were concerned, was for the benefit of the occupants of their building, and it must have been intended that the plaintiff should have the benefit of it.”²

A lease was made for business purposes of front rooms in the second story of a building set back a few feet from the line of a city street. A subsequent lessee for years of the entire building proposed to alter the building by extending the side walls to the street line and erecting a new front wall so as to inclose the original front

¹ Doyle v. Lord, 64 N. Y. 432, 439, 21 33 N. E. Rep. 700, per Allen, J., 22 L. Am. Rep. 629. R. A. 536. See Royce v. Guggenheim,

² Case v. Minot, 158 Mass. 577, 584, 106 Mass. 201, 8 Am. Rep. 322.

rooms and to interpose another room between them and the street. It was held that the alterations were inconsistent with the lessee's rights under his lease; but the time for injunction having passed, the lessee's remedy was confined to damages. "The subject of the lease is so materially changed that the rooms will no longer answer to the description of them in the lease, when the condition and situation of the premises are also looked at. The lease carries with it an implication that the lessor should not thus proceed to impair the character and value of the leased premises."¹

A lessee cannot abandon his lease and refuse payment of rent because a third person owning the adjoining land erects a building thereon which interferes with the light and air which previously had access to the tenant's windows. The lessor not owning such land at the date of the lease, the lessee had no easement by implication in the passage of light and air to the demised premises.²

571. When a tenant hires a room which receives light through glass in the floor above, he acquires a right in the nature of an easement in whatever light he might obtain through such floor lights. Therefore, if the lessor, or any one claiming under him, covers over the floor above with carpets or matting so as to prevent the light passing through the floor, a mandatory injunction may issue against him.³

572. It has been held, however, in some cases that in the absence of a covenant a landlord is not liable for obstructing his tenant's windows by building on the adjoining land.⁴

A declaration in a lease empowering the lessors, their successors and assigns, to erect or suffer to be erected any buildings on any of the adjoining or contiguous premises, whether such buildings should or should not diminish the lessee's light and air, prevents the lessee from acquiring a right to light under prescription.⁵

¹ Brande v. Grace, 154 Mass. 210, 212, 31 N. E. Rep. 633, per Allen, J. See also Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. Rep. 746.

² Hilliard v. Gas Coal Co., 41 Ohio St. 662; Lapere v. Luckey, 23 Kan. 534, 33 Am. Rep. 196.

³ O'Neill v. Breese, 3 Misc. Rep. 219, 23 N. Y. S. 526.

⁴ Keating v. Springer, 146 Ill. 481, 34

N. E. Rep. 805; Myers v. Gemmel, 10 Barb. 537; Palmer v. Wetmore, 2 Sandf. 316; Keiper v. Klein, 51 Ind. 316, not a lease, but approving of Myers v. Gemmel, and declaring that there is no distinction in principle in each case between a lease and conveyance.

⁵ Haynes v. King [1893] 3 Ch. 439, 3 Rep. 715.

IV. *By Prescription.*

573. An easement in the unobstructed passage of light and air, cannot be acquired by prescription. This is the rule now established in all the American States, with a single exception, though in several of them the English rule was followed in early cases.¹

¹**Alabama:** Ward v. Neal, 37 Ala. 500; Ray v. Lynes, 10 Ala. 63, containing an intimation to the contrary.

California: Western Granite Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. Rep. 192.

Connecticut: No occupant of real estate shall acquire by adverse occupation, the right to keep, sustain, or enjoy any window or light, so as to prevent the owner of adjoining premises from erecting and maintaining any building thereon. G. S. 1888, § 2970. If the prescriptive right ever existed in this State, it exists no longer. Robinson v. Clapp, 65 Conn. 365, 383, 32 Atl. Rep. 939, 29 L. R. A. 582. The right was doubted in 1818, in Ingraham v. Hutchinson, 2 Conn. 584.

Georgia: Turner v. Thompson, 58 Ga. 268, 36 Am. Rep. 297; Mitchell v. Rome, 49 Ga. 19.

Illinois: Keating v. Springer, 146 Ill. 481, 34 N. E. Rep. 805, 22 L. R. A. 544; Tinker v. Forbes, 136 Ill. 221, 26 N. E. Rep. 503; Dexter v. Tree, 117 Ill. 532, 6 N. E. Rep. 506; Guest v. Reynolds, 68 Ill. 478, 18 Am. Rep. 570; Gerber v. Grabel, 16 Ill. 217, so far as it is to the contrary overruled.

Indiana: Keiper v. Klein, 51 Ind. 316; Stein v. Hauck, 56 Ind. 65, 26 Am. Rep. 10.

Iowa: No easement of light or air can be acquired by the mere continuance of windows overlooking the land of another. R. S. 1888, § 3207.

Kansas: Lapere v. Luckey, 23 Kan. 534, 33 Am. Rep. 196.

Kentucky: Ray v. Sweeney, 14 Bush, 1, 29 Am. Rep. 388, per Cofer, J.

Louisiana: Servitude of light and air

cannot be acquired by prescription against the owner of the land adjacent. Oldstein v. Firemen's Build. Assoc., 44 La. Ann. 492, 10 So. Rep. 928.

Maine: Pierre v. Fernald, 26 Me. 436, 46 Am. Dec. 573; White v. Bradley, 66 Me. 254.

Maryland: Cherry v. Stein, 11 Md. 1.

Massachusetts: Whoever erects a house or other building with windows overlooking the land of another person shall not, by the mere continuance of such windows, acquire an easement of light or air so as to prevent the erection of a building on such land. Pub. Stats. 1882, ch. 122, § 1, being Stat. of 1852, ch. 144; Christ Church v. Lavez-zolo, 156 Mass. 89, 92, 30 N. E. Rep. 471; Randall v. Sanderson, 111 Mass. 114; Brooks v. Reynolds, 106 Mass. 31; Richardson v. Pond, 15 Gray, 387; Car-rig v. Dee, 14 Gray, 583; Rogers v. Sawin, 10 Gray, 376; Fifty Associates v. Tudor, 6 Gray, 255; Paine v. Boston, 4 Allen, 168; Story v. Odin, 12 Mass. 157, 7 Am. Dec. 46, overruled.

New Jersey: Hayden v. Dutcher, 31 N. J. Eq. 217; King v. Miller, 8 N. J. Eq. 559, 55 Am. Dec. 246. A dictum to the contrary in Robeson v. Petten-ger, 2 N. J. Eq. 57, 32 Am. Dec. 412, is not followed.

New York: Parker v. Foote, 19 Wend. 309, a leading case; Myers v. Gemmel, 10 Barb. 537; Banks v. American Tract Soc., 4 Sandf. ch. 438, 467; Palmer v. Wetmore, 2 Sandf. 316; Levy v. Brothers, 4 Misc. Rep. 48, 23 N. Y. Supp. 825; Knabe v. Leveille, 23 N. Y. Supp. 818; Sweeney v. St. John, 28 Hun, 634.

Ohio: Mullen v. Stricker, 19 Ohio St.

“By nature, air and light do not flow in definite channels, but are universally diffused. The supposed necessity for their passage in a particular line or direction to any lot of land is created, not by the relative situation of that lot to the surrounding lands, but by the manner in which that lot has been built upon. The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor, indeed, any use of them which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights, and cannot therefore be presumed to have assented to any such encroachment. The use and enjoyment of the adjoining lands are certainly no more subordinate to those of the house where both are owned by one man than where the owners are different.”¹

135, 2 Am. Rep. 379; *Hieatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280.

Pennsylvania: *Rennyson's App.*, 94 Pa. St. 147; *Haverstick v. Sipe*, 33 Pa. St. 368; *Hazlett v. Powell*, 30 Pa. St. 293, per Thompson, J.; *Wheatley v. Baugh*, 25 Pa. St. 528, per Lewis, C. J.; *Maynard v. Esher*, 17 Pa. St. 222; *King v. Large*, 7 Phila. 282.

Rhode Island: No easement of light or air can be acquired by the mere continuance of windows overlooking the land of another. *G. L.* 1896, ch. 205, § 4.

South Carolina: *Napier v. Bulwinkle*, 5 Rich. 311; *McCready v. Thomson*, *Dudley*, 131, overruled; *Wilson v. Cohen*, *Rice*, Ch. 80.

Texas: *Klein v. Gehrung*, 25 Tex. Supp. 232, 78 Am. Dec. 565.

Vermont: *Hubbard v. Town*, 33 Vt. 295.

Virginia: *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581, per Lewis, C. J.

West Virginia: *Cunningham v. Dorsey*, 3 W. Va. 293; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629. It is declared by statute that the common law

of England touching ancient lights, is not and never has been in force in this State. Code 1891, ch. 79, § 13.

Delaware seems to be the only State in which the English rule in respect to the acquisition of the easement of light or air has been adopted and still prevails. The doctrine of a prescriptive right to light and air is regarded as having been adopted in this State as part of the common law of England and of the Colonies at the time of the American Independence. *Clawson v. Primrose*, 4 Del. Ch. 643; *Hulley v. Security Trust Co.*, 5 Del. Ch. 578.

In *Parker v. Foote*, 19 Wend. 309, it was said it would be difficult to prove that the rule respecting ancient lights was known to the common law of England previous to April 19, 1875. It was first sanctioned in *Westminster Hall*, in 1786, in *Darwin v. Upton*, 2 Saund. 175, note 2 though there were two earlier decisions at *nisi prius*. See also, to like effect, *Hayden v. Dutcher*, 31 N. J. Eq. 217.

¹ *Keats v. Hugo*, 115 Mass. 204, 215, 15 Am. Rep. 80, per Gray, C. J.

574. In England it is the established rule that the owner of a house or building may acquire by lapse of time a prescriptive easement to light from the adjacent land. This was the rule before the Prescription Act¹ which in effect continues the rule already established by the decisions. This provides "that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Until the adverse right is acquired the owner of the adjacent land may prevent the acquisition of the easement by building upon his own land in such a manner as to obstruct the light. It is sometimes said that such owner has the "right to obstruct" a window overlooking his land; but his right is really his right to use his own land as he pleases, though in doing so he may obstruct the light received through the window of an adjoining house.² He may always do this unless he impairs a right already fully acquired by his neighbor. He may always prevent the acquisition of prescriptive rights by erecting a wall, fence or other obstruction on his land opposite the windows overlooking his land; and the owner of the house in which such windows are located cannot obtain an injunction against the putting up of such obstruction.³

A right to the light and air coming to the windows of a building, which may grow into the statutory right acquired by twenty years' use and enjoyment as of right and without interruption, commences when the exterior walls of the building with the spaces for the windows are completed, and the building is properly roofed in, although the window sashes and the glass may not be put in, and the interior may not be finished until some time afterwards. Therefore, at any time after the expiration of twenty years from such time an injunction may be granted to restrain an interference with the access of light to the windows.⁴

¹ 2 & 3 Wm. IV., c. 71, Aug. 1, 1832;
 Tapling v. Jones, 11 H. L. Cas. 290;
 Chastey v. Ackland, [1895] 2 Ch. 389;
 Stokoe v. Singers, 8 El. & Bl. 31;
 Aynsley v. Glover, L. R. 18 Eq. 544.

² Tapling v. Jones, 11 H. L. Cases, 290.

³ Bonner v. Great Western Ry. Co., 24 Ch. D. 1.

⁴ Collis v. Laughner, [1894] 3 Ch. 659,

575. By the English law the right to a passage of air through a defined channel may be acquired by prescription by way of easement. The cellar of a public house was ventilated by means of a shaft therefrom cut through the rock into a disused well situated in an adjoining yard owned by another, the air from the cellar passing through the shaft and out at the top of the well. The cellar was used for the purpose of brewing and had been ventilated in this manner for forty years at least, and with the knowledge of the adjoining owner. It was held that the easement of the free passage of air from the cellar had been acquired by use, and that a lost grant of the right ought to be inferred.¹

576. The right to the passage of air over another's land cannot be acquired by prescription, the air not being confined within definite limits.² In the absence of actual contract no one can claim a right to have the general current of air over his neighbor's property kept uninterrupted. "The claim of the plaintiffs is not to have the air pass through some definite channel constructed for the purpose of containing and communicating it, but it is to have the current of air float over the whole of the plaintiff's property — over the yard and the rest of their property at the back of the house. Such a right cannot be maintained."³ In another case it was decided that building upon a man's own land so as to diminish or interfere with the air which came to his neighbor's windmill was not a legal wrong, although the windmill had existed more than twenty years.⁴ The reason for denying the right in such cases is that the claim is too vague and extensive to be recognized by law, and that the landowner has no practical means of preventing it.⁵

577. An action cannot be maintained against an adjoining owner for obstructing the access of air to a chimney thereby caus-

8 Rep. 760, following *Courtauld v. Legh*, L. R. 4 Ex. 126.

¹ *Bass v. Gregory*, 25 Q. B. D. 481. See also *Gale v. Abbot*, 8 Jur. N. S. 987; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238, in which cases injunctions were granted to remove and prevent impediments to ventilation. In *Hall v. Lichfield Brewery Co.*, 49 L. J. Ch. 655, damages were given in respect of an obstruction of air to aperture in the nature of windows in a slaughter-

house, the right having been gained by user for thirty or forty years.

² *Harris v. De Pinna*, 33 Ch. D. 238; *Bryant v. Lefever*, 4 C. P. D. 172.

³ *Chastey v. Ackland*, L. R. [1895] 2 Ch. 389, 397, per Lopes, L. J.

⁴ *Webb v. Bird*, 10 C. B. N. S. 268, 13 C. B. N. S. 841. See also *Bryant v. Lefever*, 4 C. P. D. 172.

⁵ *Webb v. Bird*, 10 C. B. N. S. 268, 13 C. B. N. S. 841.

ing the chimney to smoke. The obstruction complained of was that the defendants in rebuilding their house had carried it up beyond its former height, and so checked the access of air to the chimney which had been enjoyed over defendants' land for more than twenty years. "But it is said, and the jury have found, that the defendants have done that which has caused a nuisance to the plaintiff's house. We think there is no evidence of this. No doubt there is a nuisance, but it is not of the defendants' causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough. It is the plaintiff who causes the nuisance by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney, let him carry it higher, and there would be no nuisance. Who, then, causes it?" This inquiry by Lord Justice Bramwell is answered in the same case by Lord Justice Cotton, who says: "The plaintiff creates the smoke which interferes with his comfort. Unless he has, as against the defendants, a right to get rid of this in the particular way which has been interfered with by the defendants, he cannot sue the defendants, because the smoke made by himself, for which he has not provided any effectual means of escape, causes him annoyance. It is as if a man tried to get rid of liquid filth arising on his own land by a drain into his neighbor's land. Until a right had been acquired by user, the neighbor might stop the drain without incurring liability by so doing. No doubt great inconvenience would be caused to the owner of the property on which the liquid filth arises. But the act of his neighbor would be a lawful act, and he would not be liable for the consequences attributable to the fact that the man had accumulated filth without providing any effectual means of getting rid of it."¹

578. No action can be maintained for opening a window overlooking the premises of another. The only remedy of the latter is to build on his land against the offensive window.² It is well

¹ Bryant v. Lefever, 4 C. P. D. 172, 179, 181.

² Chandler v. Thompson, 3 Camp. 80. Le Blanc, J., observed: "That, although an action for opening a window to disturb the plaintiff's privacy

was to be read of in the books, he had never known such an action maintained, and when he was in the Common Pleas he had heard it laid down by Lord Chief Justice Eyre that such an action did not lie, and the only remedy

settled that one may build upon his property, although the effect may be to entirely close the windows of his neighbor. "Merely owning the adjoining lot does not give the proprietor an easement over the property of another for the passage of light and air; nor is it competent for the Legislature to vest in such proprietor the power to prevent his neighbor from building such a structure as he pleases, provided it is not a nuisance, and it is not such merely because it obstructs the passage of light and air. The Legislature cannot thus create an easement in favor of certain proprietors over the lands of another, nor declare the usual and ordinary use of property a nuisance when such use infringes upon the legal rights of no one. The court found in this case that the plaintiff's windows opened toward defendant's lawn. That this portion of his premises shall be secluded and private may be a matter of great importance to defendant. That he has the right to secure such privacy, if he can, by building obstructions on his own land, has always been recognized by the courts."¹

579. One may obstruct his neighbor's windows at any time by building or erecting a wall, fence or screen on his own land. He may build such structure of any height, and his motive cannot be considered as bearing upon his legal right. This is the rule under the American doctrine that no easement of light can be acquired by prescription; and "the general rule of English law is," says Lord Blackburn,² "that a man may use his land in any way he pleases not in itself unlawful, though the effect of doing so be to darken the lights of his neighbors, not being ancient lights; and I think no English court can hinder him, even if it be done not to do

was to build on the adjoining land, opposite to the offensive window." See also *Cross v. Lewis*, 2 B. & C. 686; *Re Penny & S. E. Ry. Co.*, 7 El. & B. 660; *Turner v. Spooner*, 30 L. J. Ch. 801; *Shell v. Kemmerer*, 13 Phila. 502; *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570.

¹ *Western Granite Co. v. Knickerbocker*, 103 Cal. 111, 37 Pac. Rep. 192. This case arose upon the construction of a statute in which the phrase partition wall was used, forbidding the erection of such walls more than ten

feet high in cities and towns without the consent of the adjoining proprietor, means a wall used as a fence. Act of March 9, 1855. But the court held that this phrase, as used in the act, means a wall.

² *Guest v. Reynolds*, 68 Ill. 478, 486, 18 Am. Rep. 570; *Honsel v. Conant*, 12 Ill. App. 259; *Lapere v. Luckey*, 23 Kans. 534, 33 Am. Rep. 196; *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461, approved in *Pickard v. Collins*, 23 Barb. 444, and *Phelps v. Nowlen*, 72 N. Y. 39, 45, 28 Am. Rep. 93; *Burke v. Smith*, 69 Mich. 380, 37 N. W. Rep. 838.

himself good, but in spite, for the very purpose of darkening his neighbor's window; as the civilians say, *in emulationem vicini*. Of course, he could not obtain the assistance of a court for such an object."¹

A railway company, though restricted in the use it may make of the land acquired under its statutory powers, has the same right as any owner of land to erect walls or screens to prevent the owners of houses from acquiring rights to light and air by prescription.²

580. The owner of land may build upon his land for the express purpose of closing up windows in a building upon the adjoining land. His neighbor acquires no right to maintain his windows and receive light and air through them, though they have existed for a length of time sufficient to give title under the statute of limitations to land adversely held. One cannot be enjoined from erecting poles upon which are placed sheet-iron plates for the purpose of shutting off the light from his neighbor's windows. The motive of his act is wholly immaterial where the act itself is legal.³

Neither the continual assertion of a right to have the free passage of air and light to one's windows over the adjoining land of another, without any acts on his part in support of his claim, nor the mere acquiescence of the owner of the adjoining land without any act of recognition of such right, estops the latter from disputing a claim to a prescriptive right.⁴

581. One cannot be enjoined from erecting a high-board fence to exclude light and air from the house of another, though the fence is designed for no purpose of either ornament or use, and the only purpose in erecting the fence is to injure the neighbor and his property from motives of unmixed malice towards him. "This is not like annoying a neighbor by means of causing smoke, gas, noisome

¹ Russell v. Watts, 10 App. Cas. 590, 610. And see Bonner v. Great Western Ry. Co., 24 Ch. D. 1.

² Bonner v. Great Western Ry. Co., 24 Ch. D. 1; Foster v. London, Chatham & D. Ry. Co., 64 L. J. Q. B. 65, disapproving Norton v. London & N. W. Ry. Co., 9 Ch. D. 623, to the contrary.

³ Levy v. Brothers, 4 Misc. Rep. 48, 50, 23 N. Y. Supp. 825. "It will not do for a man to build to the extreme end

of his lot, and then complain because his rear neighbor, in exercising the same privilege, has cut off the light, air or prospect he formerly enjoyed. He should not rely upon the generosity of his neighbor, and must depend upon himself by reserving space enough on his own land for all his requirements, light, air and vision included." Per McAdam, J.

⁴ Tinker v. Forbes, 136 Ill. 221, 26 N. E. Rep. 503.

smells, or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises, and conveyed to the premises of another; but in this case nothing is sent, but the air and light are withheld. A man may be compelled to keep his gas, smoke, odors and noise at home, but he cannot be compelled to send his light and air abroad. * * * In such cases it is the effect or injury, and not the motive, that is regarded. The true test is whether anything recognized by law as injurious passes from the premises of one neighbor to that of another. Anything so passing invades the legal rights of him whose premises it reaches, and such rights will be protected. But courts cannot regulate or control the moral conduct of a man unless authorized so to do by statute." One has a legal right to erect and maintain such a fence, and neither at law nor in equity can its removal be compelled.¹

Unquestionably, if one erects anything offensive so near the house of another that it thereby becomes useless, such as a lime-kiln, a dye-house, a brew-house, a tallow-furnace, a tan-vat, or the like, he is liable to an action, or the erection of such offensive structure may be enjoined. But a fence, wall or building, unless made of offensive material, is not a nuisance for which the owner of adjoining land or building can maintain an action.²

582. There is authority, however, that the obstruction of a neighbor's windows may be enjoined, where this is done through malice. Thus it has been held that an injunction will lie to restrain one from erecting and maintaining a high fence on the division line, between his land and that of his neighbor, which shuts off the air and view from his neighbor's building, and thereby renders it damp and unhealthy, if it appears that the motive in building the fence is to annoy his neighbor and injure his property.³

583. No action can be maintained for obstructing a view, except upon an express covenant giving a right to the view.⁴ This is so

¹ Letts v. Kessler (Ohio St.) 42 N. E. Rep. 765, overruling Kessler v. Letts, 7 Ohio C. Ct. 108.

² Honsel v. Conant, 12 Ill. App. 259.

³ Peck v. Roe (Mich.) 67 N. W. Rep. 1080; Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. Rep. 457; Flaherty v. Moran, 81 Mich. 52, 45 N. W. Rep. 381;

Burke v. Smith, 69 Mich. 380, 37 N. W. Rep. 838. In this last case the court was equally divided, and nothing was decided.

⁴ Harwood v. Tompkins, 24 N. J. L. 425; Lyon v. McDonald, 78 Tex. 71, 14 S. W. Rep. 261, 9 L. R. A. 295.

even under the English law regarding easements of light and air. In *Aldred's Case*,¹ Chief Justice Wray is reported by Coke as saying: "That for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary; * * * but that for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect. * * * But the law don't give an action for such things of delight."

In Louisiana² the Code declares that servitudes of view are of two kinds: one which confers the right of full view with the power of preventing one's neighbor from raising any buildings which obstruct it, and the other which gives an owner the right of preventing his neighbor from having any view or lights on the side on which their estates unite, or that he exercise these servitudes according to his title.

Servitudes of light are also of two kinds: one which gives the owner of a house the right of opening windows in a wall held in common, for the admission of light, with the right also of preventing his neighbors from raising any building which can obstruct the admission of light; and the other, which gives the right of preventing one's neighbor from opening his wall, or a wall held in common, for the admission of light from a yard or other place, or which limits him to certain lights which are conferred by his title.

584. Neither is there any law which prevents one from building upon his own land so as to hide his neighbor's house from view as one approaches it along a street. In a case in which the plaintiff asked that the defendant be enjoined from erecting a building, one ground put forward was that the building would obstruct the view of his place of business and of a sign indicating the materials in which he dealt, and so be likely to deprive him of customers. Lord Chelmsford, L. C., said:³ "The good sense of the counsel restrained them from pressing this point very far. I suggested, in the course of the argument, that if the building of a wall which merely intercepts the prospect of another, without obstruction to his light and air, is not a legal injury, it was very difficult to see how a building which merely obstructed premises from the view of passers-by,

¹ 9 Coke 576.

³ *Butt v. Imperial Gas Co.*, L. R. 2

² R. Civ. Code, 1889, arts. 716, 717.

Ch. 158.

could be the subject of an action.” In another case⁴ the plaintiff was the owner of a shop in Bond street, and the defendant, who was the owner of an adjoining house, commenced certain alterations which would throw the front of his house further into the street. The plaintiff complained that these alterations interfered with his ancient lights, and filed a bill for an injunction. It appeared from the evidence that the alterations prevented the plaintiff’s shop from being seen so far down the street as before, but did not interfere with light within the shop or the light on the goods displayed in the window. Vice-Chancellor Wood refused an injunction, saying: “All that could be complained of was, that persons could not see the goods so soon as they might if the alterations objected to had not been made. When they came in front of the shop the goods would be seen just as well as before. So, if a sign were hung up in front of a shop, such as pawnbroker’s balls, which could be seen for a long distance, there was nothing to prevent a neighbor building on his own ground in such a way as to obstruct the distant view of such a sign.”¹

¹ Smith v. Owen, 35 L. J. Ch. 317, 14 not be regarded as an authority to the W. Rep. 422. See Riviere v. Bower, contrary. Ry. & Moo. 24, which, however, can-

CHAPTER XIV.

SUPPORT.

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I. *Nature and Application of the Easement of Lateral Support to Land.*

585. Every owner of land has a right to have the soil of his neighbor's land remain as a support for his land in its natural condition.¹ Each of two adjoining landowners is entitled to the

¹ **Humphries v. Brogden**, 12 Q. B. 739; **Rigby v. Bennett**, 21 Ch. D. 559; **Wyatt v. Harrison**, 3 B. & Ad. 871; **Attorney-General v. Conduit Colliery Co.**, [1895] 1 Q. B. 301; **Transportation Co. v. Chicago**, 99 U. S. 635.

Alabama: **Moody v. McClelland**, 39 Ala. 45, 84 Am. Dec. 770; **Myer v. Hobbs**, 57 Ala. 175, 29 Am. Rep. 719.

California: **Green v. Berge**, 105 Cal. 52, 38 Pac. Rep. 539; **Aston v. Nolan**, 63 Cal. 269.

Indiana: **Moellering v. Evans**, 121 Ind. 195, 22 N. E. Rep. 989, 6 L. R. A. 449; **Block v. Haseltine**, 3 Ind. App. 491, 29 N. E. Rep. 937.

Kansas: **Winn v. Abeles**, 35 Kan. 85, 10 Pac. Rep. 443.

Kentucky: **Louisville & N. R. Co. v. Bonhayo**, 94 Ky. 67, 21 S. W. Rep. 526; **Covington v. Geylor**, 93 Ky. 275, 19 S. W. Rep. 741; **Clemens v. Speed**, 93 Ky. 284, 19 S. W. Rep. 660; **Oneil v. Harkins**, 8 Bush, 650.

Maryland: **Baltimore & P. R. Co. v. Reaney**, 42 Md. 117.

Massachusetts: **Foley v. Wyeth**, 2 Allen, 131, 79 Am. Dec. 771; **Thurston v. Hancock**, 12 Mass. 220, 7 Am. Dec. 57; **Gilmore v. Driscoll**, 122 Mass. 199, 23 Am. Rep. 312.

Michigan: **Gildersleeve v. Hammond** (Mich.), 67 N. W. Rep. 519; **Buskirk v. Strickland**, 47 Mich. 389, 11 N. W. Rep. 210.

Minnesota: **Nichols v. Duluth**, 40 Minn. 389, 42 N. W. Rep. 84; **Schultz v. Bower**, 57 Minn. 493, 59 N. W. Rep. 631, per Mitchell, J., 66 N. W. Rep. 139; **Kopp v. Northern Pac. R. Co.**, 41 Minn. 310, 43 N. W. Rep. 73.

Missouri: **Eads v. Gains**, 58 Mo. App. 586; **Secongost v. Missouri Pac. R. Co.**, 53 Mo. App. 369; **Victor Min. Co. v. Morning Star Min. Co.**, 50 Mo. App. 525; **Charless v. Rankin**, 22 Mo. 566, 66 Am. Dec. 642; **Busby v. Holthaus**, 46 Mo. 161.

lateral support of the other's land. The right of lateral support from the adjacent soil, to the extent that such support is essential, is an absolute right of property. The right to recover for injuries to the land by reason of the removal of such support does not depend upon negligence, but upon the violation of the right of property.

586. This right is a natural and not a conventional one. "In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the *status quo* of the land is maintained; and therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet*. All existing divisions of property in land must have been attended with this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo, ut alienum non lædas*. * * * Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to

New Jersey: McGuire v. Grant, 25 N. J. L. 356, 362, 67 Am. Dec. 49; Schultz v. Byers, 53 N. J. L. 442, 22 Atl. Rep. 514.

New York: Lasala v. Holbrook, 4 Paige, 169, 25 Am. Dec. 524; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Radcliff v. Mayor, 4 N. Y. 195, 53 Am. Dec. 357; Farrand v. Marshall, 21 Barb. 409; Pantou v. Holland, 17 Johns. 92, 8 Am. Dec. 369.

Pennsylvania: McGettigan v. Potts, 149 Pa. St. 155, 24 Atl. Rep. 198, 30 W. N. C. 137; Carlin v. Chappel, 101 Pa. St. 348, 47 Am. Rep. 722; Wier & Bell's App., 81* Pa. St. 203.

South Dakota: Ulrick v. Dakota L. & T. Co., 2 S. D. 285, 3 S. D. 44, 49 N. W. Rep. 1054, affirmed 51 N. W. Rep. 1023.

Vermont: Richardson v. Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283; Beard v. Murphy, 37 Vt. 99, 86 Am. Dec. 693; Hatch v. Vermont Cent. R. Co., 25 Vt. 49; Graves v. Mattison, 67 Vt. 630, 32 Atl. Rep. 498.

Virginia: Stearns v. Richmond, 83 Va. 992, 14 S. E. Rep. 847, 29 Am. St. Rep. 758; Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581; Stevenson v. Wallace, 27 Gratt. 77, 86.

make it a burden upon the neighbor's land which (naturally) would be free from it. This distinction (and, at the same time, its proper limit) was pointed out by Willes, J., in *Bonomi v. Backhouse*,¹ where he said: 'The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *prima facie* a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant;² whilst the latter must be founded upon prescription of grant, express or implied; but the character of the rights, when acquired, is in each case the same.' ''³

587. In several states there are statutes affecting the law of this subject. In California, Idaho, Montana, North Dakota, Oklahoma and South Dakota, a statute, the same in terms in each State, provides that each co-terminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations.⁴

¹ 1 E. B. & E. 622, 655.

² See *Caledonian Railway Co. v. Sprot*, 2 Macq. 449.

³ *Dalton v. Angus*, 6 App. Cas. 740, 791, 792, per Lord Chancellor Selborne.

For a discussion of the question as to the foundation of the right of lateral support, see a learned article by F. V. Balch, Esq., in 1 Am. Law Rev. 1.

In *Pountney v. Clayton*, 52 L. J. Q. B. 566, 571, Bowen, L. J., called this easement an "obscure right," saying: "This is a very intricate matter, because, in the first place, the subject-matter is the right to support — an obscure right, even when it is created by contract."

⁴ **California**: Civ. Code, § 832.

Idaho: R. S. 1887, § 2884.

Montana: Civ. Code 1895, § 1293.

North Dakota: Civ. Code 1895, § 3375.

Oklahoma: Comp. Stats. 1893, § 3748.

South Dakota: Comp. Laws 1887, §

2784.

The purpose of a notice required is to give the adjacent land owner an opportunity to protect his property from possible damage, if he so desires, or to assume the risk of the results of the threatened excavations. The notice does not impose a legal duty upon such landowner to protect his land. It is incumbent upon the party making the excavation to use ordinary care and skill and take reasonable precautions. *First Nat. Bank v. Villeggia*, 92 Cal. 96, 28 Pac. Rep. 97. See also *Conboy v. Dickinson*, 92 Cal. 600, 28 Pac. Rep. 809; *Dunton v. Niles*, 95 Cal. 494, 30 Pac. Rep. 762; *Ulrick v. Dakota, L. & T. Co.*, 2 S. D. 285, 3 S. D. 144, 49 N. W. Rep. 1054, affirmed 51 N. W. Rep. 1023.

This statute is merely declaratory of the common law, and imposes no new

A statute applicable to the city of New York provides that where an excavation on any land is to be made to the depth of more than ten feet below the curb, and there shall be any wall on adjoining land and standing near the boundary, whether such wall is down more or less than ten feet below the curb, the person making such excavation, "if afforded the necessary license to enter on the adjoining land, and not otherwise," shall preserve such wall from injury. Under this statute it is the duty of one making the excavation at all times from the commencement to the completion of the same at his own expense to preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before the excavation was commenced. "It is entirely immaterial as far as this act is concerned whether the excavator allows the adjoining house to fall scientifically or negligently."¹

In Ohio, if the owner or possessor of any lot or land, in any city or village, digs, or causes to be dug, any cellar, pit, vault, or excavation to a greater depth than nine feet below the curb of the street on which such lot or land abuts, or, if there be no curb, below the surface of the adjoining lots, and by such excavation causes any damage to any wall, house or other building upon the lots adjoining thereto, such owner or possessor shall be liable, in a civil action, to the party injured to the full amount of the damage aforesaid. Such owner or possessor may dig, or cause to be dug, any such cellar, pit or excavation to the full depth of any foundation wall of any building upon the adjoining lots, or to the depth of nine feet below the established grade of the street whereon such lot abuts, without

duty upon one intending to execute on his own land, unless it be the duty of giving reasonable notice of his intention. *Aston v. Nolan*, 63 Cal. 269; *Sullivan v. Zeiner*, 98 Cal. 346, 33 Pac. Rep. 209.

¹ *Cohen v. Simmons*, 21 N. Y. Supp. 385, 66 Hun, 634; Laws 1882, ch. 410 (Consolidated Act), § 474, as amended in 1887, ch. 566, § 3.

This statute is not applicable to excavations made in the street under municipal authority. *Jencks v. Kenny*, 28 Abb. N. C. 154, 19 N. Y. Supp. 243.

This statute does not require the owner of the adjoining land to tender a license in order to be entitled to the

benefit of the statute; but it is incumbent upon the party causing the excavation to be made to request permission to enter and proceed with the excavation without supporting the wall; and if he fails so to do, he is liable for the damages. *Dorrity v. Rapp*, 72 N. Y. 307. If the license is revoked after the excavation has been commenced, the party making it may proceed with the work, notwithstanding the revocation. *Ketchum v. Newman*, 116 N. Y. 422, 22 N. E. Rep. 1052. See also, as to construction of statute, *Bernheimer v. Kilpatrick*, 53 Hun, 316, 6 N. Y. Supp. 858; *Cohen v. Simmon*, 21 N. Y. Supp. 385, 66 Hun, 634.

reference to the depth of adjoining foundation walls, without incurring the liability prescribed in this chapter.¹

588. The only neglect necessary to give a cause of action is the neglect to furnish proper support to the land of the adjoining owner to prevent its caving in.² The only proof necessary is of the making of the excavation and of the injury to the adjoining land in consequence. It is not incumbent on the plaintiff to show that the excavation was made by the defendant in a careless, negligent or unskillful manner.³

Though one in excavating and removing the soil on his own land has not conducted the work negligently or in a manner contrary to the custom of the country, he is liable to his neighbor for any injury to his land occasioned by such excavation.⁴

Where one, by digging on his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall. It is the wrong to the right of property that attaches to the right of lateral support. Hence the measure of damages is the diminution of the value of the land by reason of the falling of the soil; and it is immaterial whether this falling be called "caving" or "washing," provided it is the natural and proximate result of removing the lateral support.⁵

589. The parties may, however, agree that all support may be removed, or may agree upon the compensation for such removal. One who has granted land, reserving the right to enter on a certain

¹ R. S. 1892, §§ 2676, 2677.

The law of easements as to lateral support is regulated by this statute when the circumstances are such that it applies. The statute, however, has not destroyed the principle set forth in the maxim *sic utere tuo ut alienum non lædas*. United States v. Peachy, 36 Fed. Rep. 160. See, also, Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421; McMillen v. Watt, 27 Ohio St. 306.

² Green v. Berge, 105 Cal. 52, 38 Pac. Rep. 539; Conboy v. Dickinson, 92 Cal. 600, 28 Pac. Rep. 809; Aston v. Nolan, 63 Cal. 269; Gildersleeve v. Hammond (Mich.), 67 N. W. Rep. 519; Baltimore & P. R. Co. v. Reaney, 42 Md. 117;

Richardson v. Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283; McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Hay v. Cohoes Co., 2 N. Y. 159, 162, 51 Am. Dec. 279; Ulrick v. Dakota L. & T. Co., 2 S. D. 285, 3 S. D. 44, 49, N. W. Rep. 1054, affirmed 51 N. W. Rep. 1023.

³ Transportation Company v. Chicago, 99 U. S. 635; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312; Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771.

⁴ Humphries v. Brogden, 12 Q. B. D. 737; Brown v. Robins, 4 H. & N. 186.

⁵ Schultz v. Bower, 57 Minn. 493, 59 N. W. Rep. 631.

part thereof and dig and take clay and sand for making brick or to work minerals, is at liberty to remove the lateral support of the land granted by digging within the part designated in the exercise of the right reserved.¹

Where land was granted for building purposes, reserving the minerals beneath with power to get them, "but without entering upon the surface, so that compensation in money be made for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties," the grantor was entitled to take the minerals without leaving any support, subject only to compensation for damage.²

The right to natural support for land is presumed to be incident always to the ownership of the land, and it is for the party who claims that this right has been parted with to prove it.³

590. There is no cause of action, however, if no damage was done. The right of the owner of land to the lateral support of his neighbor's land is not an absolute right, irrespective of the element of damages, and the infringement of it is not a cause of action without appreciable damage. "But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbor; and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount."⁴ There is no right of action unless the soil of the land is disturbed, though, by reason of the digging, the land presents an unsightly appearance.⁵

591. The support to which a landowner is entitled from the adjacent land is confined to a limited extent of adjacent land, that is, to such an extent as in its natural undisturbed state was sufficient to afford the requisite support.⁶ If the adjoining owner excavates nearer to the boundary line than such limit, he is bound to furnish support to the land by artificial means, such as a retain-

¹ Ryckman v. Gillis, 57 N. Y. 68, reversing 6 Lans. 79.

² Aspden v. Seddon, L. R. 10 Ch. 394, 11 Exch. D. 496. And see Smart v. Morton, 5 El. & B. 30; Roberts v. Haines, 6 E. & B. 643, 7 E. & B. 625; Harris v. Ryding, 5 M. & W. 60.

³ Dixon v. White, 8 App. Cas. 833;

Dalton v. Angus, 6 App. Cas. 740, 792; Davis v. Treharne, 6 App. Cas. 460.

⁴ Smith v. Thackerah, L. R. 1 C. P. 564, 566, per Erle, C. J.

⁵ Williams v. Kenney, 14 Barb. 629.

⁶ Birmingham v. Allen, 6 Ch. D. 284, affirmed on appeal; Elliot v. North Eastern Ry., 10 H. L. Cas. 333.

ing wall. By such means the excavation may be made fully up to the boundary line.¹ The artificial support substituted in place of the natural support of the soil may be of any material, provided it is sufficient for the purpose, and it is continued so as to maintain the land in its proper condition.²

One cannot escape liability for an injury caused by insufficient support by showing that the support was a reasonable or customary support, or that the excavations were made with care and skill. It is simply requisite that the support shall prove to be sufficient and effectual.³

The extent in point of distance to which the right of lateral support applies must necessarily depend very much upon the nature of the surface of the land and of the adjacent soil. "If the soil is adhesive, so that it will remain in its natural position with the lateral support removed, obviously the excavator may excavate as deep as he pleases—even close to the boundary line. If in such case his neighbor's land caves in by reason of the pressure of the superstructure upon it, it is *damnum absque injuria*. But is this true of a sandy, gravelly soil? Most of the authorities above cited recognize the duty of the excavator to use reasonable care in the performance of his work."⁴

592. One is not justified in removing the support of his neighbor's land on the ground that the land of both is higher than the adjoining street, and the excavation is made for the purpose of reducing the grade of the land to the level of the street.⁵

If the adjoining lands are not upon the same grade, but are upon a hillside, the higher land is still entitled to the support of the lower, and consequently the owner of the latter cannot excavate so near to the boundary line as he could if the properties were on the same grade.⁶

593. Whether an abutting owner is entitled to the lateral support of the adjoining land in a public street, and a city or town is liable for damage to such owner's land occasioned by excavations in grading the street, is a question upon which there is a conflict of

¹ Weir v. Bell's App., 81* Pa. St. 625; Davis v. Treharne, 6 App. Cas. 203; Altwater v. Woods, 1 W. N. C. 23. 460.

² Snarr v. Granite Curling & Skating Co., 1 Ont. 102.

⁴ Gildersleeve v. Hammond (Mich.), 67 N. W. Rep. 519.

³ Darley Main Co. v. Mitchell, 11 App. Cas. 127; Roberts v. Haines, 7 El. & B.

⁵ Stimmel v. Brown, 7 Houst. 219, 30 Atl. Rep. 996.

⁶ Weir v. Bell's App. 81* Pa. St. 203.

opinion. On the one hand, a city or town is regarded as subject to the same liability as a private owner of land is.¹ A city or town removing the adjacent support of land abutting on the street, so that in consequence the land falls, is regarded as taking the land for public purposes, and compensation must be made for such a taking. If there are improvements upon the land, and their weight has not conduced to the falling of the land, the damages recoverable from the city or town may include the damage to the improvements.²

594. A city is liable for constructing a sewer under a street upon "made ground" which caused a house upon abutting land to settle, if the injury was occasioned by the construction of the sewer, and not solely by the condition of the ground. But no recovery could be had if the ground upon which the house stood was so deficient in firmness and solidity as to be inadequate to sustain a building under the conditions which are usual in the conduct of necessary public works upon the highway. "It having been clearly established by the verdict that the work of construct-

¹ Dyer v. St. Paul, 27 Minn. 457, 8 N. W. Rep. 272; O'Brien v. St. Paul, 25 Minn. 331, 33 Am. Rep. 470; Nichols v. Duluth, 40 Minn. 389, 42 N. W. Rep. 84; Armstrong v. St. Paul, 30 Minn. 299, 15 N. W. Rep. 174; Burr v. Leicester, 121 Mass. 241; Cabot v. Kingman, 166 Mass. 403, 44 N. E. Rep. 344, an excavation for a sewer; Stearns v. Richmond, 88 Va. 992, 14 S. E. Rep. 847; Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421; Akron v. Chamberlain Co., 34 Ohio St. 328, 32 Am. Rep. 367; Cincinnati v. Penny, 21 Ohio St. 499, 8 Am. Rep. 73; Crawford v. Delaware, 7 Ohio St. 459; Parke v. Seattle, 5 Wash. 1, 20 L. R. A. 68, 34 Am. St. 839; Harmon v. Omaha, 17 Neb. 548, 23 N. W. Rep. 503, under bill of rights of Constitution 1875; Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412, under Constitution, art. 2, § 13; Aurora v. Fox, 78 Ind. 1. But see Delphi v. Evans, 36 Ind. 90, 10 Am. Rep. 12; Louisville v. Louisville Rolling Mill Co., 3 Bush, 416, 96 Am. Dec. 243; Meares v. Wilmington, 9 Ired. 73, 49 Am. Dec. 412; New Westminster v.

Brighthouse, 20 Can. S. C. 520, 38 Am. & Eng. Corp. Cas. 315; Lewis on Eminent Domain, §§ 100, 151.

Pennsylvania: Const. 1874, art. 16, § 8; O'Brien v. Philadelphia, 150 Pa. St. 589, 24 Atl. Rep. 1047, 30 Am. St. Rep. 832; Jones v. Bangor, 144 Pa. St. 638, 23 Atl. Rep. 252; Ogden v. Philadelphia, 143 Pa. St. 430, 22 Atl. Rep. 694; New Brighton v. Peirsol, 107 Pa. St. 280; New Brighton v. United Pres. Church, 96 Pa. St. 331; otherwise, before the Constitution of 1874; O'Connor v. Pittsburgh, 18 Pa. St. 187; Philadelphia v. Wright, 100 Pa. St. 235.

Illinois: Under the Constitution adopted in 1870, a recovery may be had where private property has been damaged from the making and use of the public improvement, whether the damage be direct or consequential. Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820; Rigney v. Chicago, 102 Ill. 64; Chicago & W. Ind. R. Co. v. Ayres, 106 Ill. 511. These cases overrule the doctrine of the earlier cases in this State.

² Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421.

ing the sewer, and not the character of made ground on which the house was erected, was the cause of the injury, the case is within the very letter as well as the spirit of the constitutional mandate which requires municipal and other corporations, etc., to 'make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements.' To hold otherwise would defeat one of the main objects of that provision."¹

Where sewerage commissioners were authorized by an act of the Legislature to construct a sewer through a street, and land and buildings of an abutting owner were injured by the withdrawal of quicksand beneath the surface of such land, which flowed freely into the excavation made for the sewer, and was taken out by means of buckets and pumps, so that the buildings settled and cracked, it was held that the commissioners were liable for the injury. The plaintiff did not offer to prove that he owned the fee of the soil in the street where the right to construct the sewer was taken. But even if he owned the fee, the taking of the land for the sewer imposed no additional servitude upon the land under the highway,² and no right of any sort was taken in the plaintiff's land. It was held that the defendants had no right to take away the soil of the plaintiff in land they had not taken under the statutes, or to withdraw the support to his land abutting on the street.³

A city negligently excavating a river bottom around and near piles on which a building rested, whereby they are undermined, is liable in trespass to the owner for the damage occasioned, where it appears that the excavation was made for the purpose of saving the expense of frequent removals of sand and sewerage, deposited by the city itself in the river by the maintenance of a sewer, and that the excavation was not a legitimate dredging which the city might, perhaps, be entitled to do for the improvement of its harbor in the interest of navigation.⁴

595. There is however much authority for holding that a municipal corporation acting under proper legislative authority is not liable for consequential damages to the property of an adjoining

¹ Ladd v. Philadelphia, 171 Pa. St. E. Rep. 649; Lincoln v. Commonwealth, 485, 492, per Sterrett, C. J. 164 Mass. 1, 41 N. E. Rep. 489.

² Chelsea Dye-House & L. Co. v. Commonwealth, 164 Mass. 350, 41 N. E. Rep. 344. ³ Cabot v. Kingman, 166 Mass. 403, 44 N. E. Rep. 344.

⁴ Pomroy v. Granger, 18 R. I. 624.

landowner, whose lands are not actually taken, occasioned through the grading of a street, there being no want of care or skill in the execution of the work.¹ The State has the authority to adapt a street to easy and safe passage; a city is the agent of the State to do this, and is not answerable for damages incurred under such authority.

The adjoining landowner cannot acquire by prescription any right to abridge the power of a municipality to regulate and change the grade of its streets.²

The public authorities are liable for damages to the owner of lands abutting upon a proposed street which has not been accepted, and for the opening of which no authority is shown. Though the ultimate purpose may have been to open the street, if no order or resolution binding upon the municipal corporation appears, but it is manifest that the object of the public authorities immediately in view was the procuring of gravel for use in other parts of the village, there is a clear liability for the removal of the lateral support of land adjoining such proposed street.³

¹ Boulton v. Crowther, 2 B. & C. 703; Transportation Company v. Chicago, 99 U. S. 635; Smith v. Washington, 20 How. 135; Cheever v. Shedd, 13 Blatch. 258; Callender v. Marsh, 1 Pick. 418; Rome v. Omberg, 28 Ga. 46, 73 Am. Dec. 748; Fellowes v. New Haven, 44 Conn. 240, 26 Am. Rep. 447; Hollister v. Union Co., 9 Conn. 436, 25 Am. Dec. 36. And see, in connection, Healey v. New Haven, 49 Conn. 394, 2 Am. & Eng. Corp. Cas. 450; Delphi v. Evans, 36 Ind. 90, 10 Am. Rep. 12. But see, in connection, Aurora v. Fox, 78 Ind. 1; Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Radcliff v. Mayor, 4 N. Y. 195, 53 Am. Dec. 357. And see cases cited by Bronson, C. J.: Wilson v. Mayor, 1 Denio, 595, 43 Am. Dec. 719; O'Connor v. Pittsburgh, 18 Pa. St. 187, but otherwise in this State since Constitution of 1874.

In Quincy v. Jones, 76 Ill. 231, 242, 20 Am. Rep. 243, Mr. Justice Scholfield said: "It is the unquestioned duty of the city, in controlling and improving the streets, to prepare them for public use as streets, at such time and in such

manner as the public necessities may require. Holding them in trust for the public, and having no authority to convey or direct them for other uses, it would seem inevitable to follow that they can have no power to grant to individuals rights or easements in the street which might in any way interfere with the duty of preparing them for the public use, to meet the public necessities; for it is obvious that if such rights may be granted, then the practical use of the streets may become so burdened with private rights as to place it beyond the pecuniary ability of the city to discharge its duty to the public, with reference to them. It is not consistent to say that the city owes a duty to the public, and yet that it may voluntarily place it beyond its power to discharge that duty." See, however, Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412, and § 594, note.

² Smith v. Washington, 20 How. 135; Goszler v. Georgetown, 6 Wheat. 593.

³ Buskirk v. Strickland, 47 Mich. 389, 11 N. W. Rep. 210.

Under a constitutional provision or statute declaring that municipal corporations shall make compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, one may recover damages to his land resulting from the change of grade of the street upon which such land abuts.¹

596. Whether this principle is applicable to the acts of private corporations authorized by the legislature to construct works of a public character, such as canals or railroads, is a question upon which the authorities are not agreed. On the ground that such works, though used by the public, are constructed primarily for the benefit of private corporations who are not public agents, it is held that damages done by them by making excavations and removing the support of adjoining lands may be recovered against them in the same manner as against private individuals.² It is competent for the Legislature to provide for such damages.³

On the other hand, it is held that such corporations acting under the authority of the State are not liable for damages occurring to adjoining lands through excavations made in the construction of such works, if these are made in a careful and skillful manner.⁴

II. *The Easement of Subjacent Support.*

597. A servitude of subjacent support exists in favor of the surface land against the mineral estate underneath it, in case one person owns the surface and another owns the minerals.⁵ This

¹ O'Brien v. Philadelphia, 150 Pa. St. 589, 24 Atl. Rep. 1047; Jones v. Bangor, 144 Pa. St. 638, 23 Atl. Rep. 252; Ogden v. Philadelphia, 143 Pa. St. 430, 22 Atl. Rep. 694.

² Cheever v. Shedd, 13 Blatchf. 258, 264, per Shipman, J.; Baltimore & P. R. Co. v. Reaney, 42 Md. 117; Ludlow v. Hudson River R. Co., 6 Lans. 128; McCullough v. St. Paul, M. & M. R. Co., 52 Minn. 12; Richardson v. Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283.

³ Dodge v. County Commissioners, 3 Met. 380; Parker v. Boston & Maine R. Co., 3 Cush. 107, 50 Am. Dec. 709;

Trowbridge v. Brookline, 144 Mass. 139, 10 N. E. Rep. 796.

⁴ Mercy Docks Trustees v. Gibbs, 11 H. L. Cas. 686, 713; Boothby v. Androscoggin & K. R. Co., 51 Me. 318; Hortsman v. Covington & L. R. Co., 18 B. Mon. 218; Newport & Cincinnati Bridge Co. v. Foote, 9 Bush. 264.

⁵ Humphries v. Brogden, 12 Q. B. 739, while the right was just established; Davis v. Treharne, 6 App. Cas. 460, 466; Bell v. Love, 10 Q. B. D. 547, 558; Love v. Bell, 9 App. Cas. 286; London & N. W. R. Co. v. Evans, [1893] 1 Ch. 16. See Dixon v. White, 8 App. Cas. 883; Great West. R. Co.

principle has no application where the same person is the owner of both estates; nor does it apply where by contract between the parties they have changed the rule, for the owner of the surface may part with this right of support by his deed or covenant. But the absolute right to such support is not taken away by mere implication from language not necessarily importing such a result, as where a clause in the deed conveying the surface land, but reserving the coal, provides that the grantor in mining and removing the coal shall do as little damage to the surface as possible. "If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and, if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. Perhaps it may be said that, if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his grant, and is seeking to hinder the grantee from doing what he likes with his own; but, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals be removed; and a man must so use his own as not to injure his neighbor."¹

Whenever there has been a separation in ownership of the mines

v. Cefn Cribbwr Br. Co., [1894] 2 Ch. 157; *Harris v. Ryding*, 5 M. & W. 60; *Hext v. Gill*, L. R. 7 Ch. 699; *Smart v. Morton*, 5 El. & B. 30; *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Eadon v. Jeffcock*, L. R. 7 Exch. 379; *Roberts v. Haines*, 6 El. & B. 643; *Pringle v. Vesta Coal Co.*, 172 Pa. St. 438, 33 Atl. Rep. 690; *Williams v. Hay*, 120 Pa. St. 485, 14 Atl. Rep. 379; *Robertson v. Coal Co.*, 172 Pa. St. 566, 33 Atl. Rep. 706; *Carlin v. Chappel*, 101 Pa. St. 348, 47 Am. Rep. 722; *Scranton v. Phillips*, 94 Pa. St. 15; *Coleman v. Chadwick*, 80 Pa. St. 81, 21 Am. Rep. 93; *Horner v. Watson*, 79 Pa. St. 242, 21 Am. Rep. 55; *Jones v. Wagner*, 66 Pa. St. 429, 5 Am. Rep. 385; *Erickson v. Mich. Land & T.*

Co., 50 Mich. 604, 16 N. W. Rep. 161; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 556, 14 Am. Rep. 322; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322; *Mickle v. Douglas*, 75 Iowa, 78, 39 N. W. Rep. 198; *Livingston v. Moingona Coal Co.*, 49 Iowa, 369; 31 Am. Rep. 150; *Yandes v. Wright*, 66 Ind. 319, 32 Am. Rep. 109; *Burgner v. Humphrey*, 41 Ohio St. 340.

¹ *Humphries v. Brogden*, 12 Q. B. 739, 746, per Lord Campbell, C. J. See also *Harris v. Ryding*, 5 M. & W. 60; *Hext v. Gill*, L. R. 7 Ch. 699; *Love v. Bell*, 9 App. Cas. 286; *Livingston v. Moingona Coal Co.*, 49 Iowa, 369, 31 Am. Rep. 150.

beneath the surface from the surface, the owner of the latter, in the absence of an agreement to the contrary, has an absolute right to have the surface supported precisely as it was in its natural state. "If the owner of the coal undertakes to mine and remove it — as he has an undoubted right to do — and damage results to the surface, either, 1, from negligence in conducting his mining operations, or, 2, from failure to properly and sufficiently support the surface, or, 3, from both these causes combined, the surface owner is entitled to recover compensation for such injury as he may show he has sustained." ¹

598. There is an easement of support for an upper strata of coal or other mineral as against the owner of the underlying strata.² This is not necessarily the same in kind and degree as the right of support for the surface land; but it is a support sufficient to enable the owner of the upper strata to take out the coal or other mineral. "There can be no question that when the owner of several seams of coal sells or lets some of the upper seams, he must by that grant confer on the purchaser or lessee a right to sufficient support from the underlying strata to enable him to use the strata granted for the purpose for which he acquired them." ³

599. The right to surface support may be released by apt words;⁴ but such a release will not be implied from language that does not necessarily import it.⁵ "The grant of a mineral estate, or of the right to mine, is a grant of the right to penetrate the earth in search of the mineral stratum, and, when found, to quarry and remove the mineral in a proper manner. Such injuries as are the necessary result of this process do not afford a cause of action to the owner of the surface. If his springs are drained or his well destroyed, as the natural result of the excavation made to reach and remove the coal, he has no right to complain."⁶ But a sale of all the coal under a tract of land is not in terms or by necessary implication a release of the right to surface support, any more than the

¹ *Pringle v. Vesta Coal Co.*, 172 Pa. St. 438, 442, 33 Atl. Rep. 690, per Curiam.

² *Robertson v. Coal Co.*, 172 Pa. St. 565, 33 Atl. 706.

³ *Mundy v. Duke of Rutland*, 23 Ch. D. 81, 89, per Kay, J.

⁴ *Robertson v. Coal Co.*, 172 Pa. St.

566, 571, 33 Atl. Rep. 706; *Scranton v. Phillips*, 94 Pa. St. 15; *Smith v. Darby*, L. R. 7 Q. B. 716.

⁵ *Williams v. Hay*, 120 Pa. St. 485, 14 Atl. Rep. 379. And see *Davis v. Treharne*, 6 App. Cas. 460.

⁶ *Turner v. Reynolds*, 23 Pa. St. 199.

sale of the first story of a building, two or more stories in height, would be a release of the floor so sold from its visible servitude to the remainder of the building. The release must be in either case by express words or by necessary implication."¹

600. But the owner of minerals has the right to take them away provided he furnishes other sufficient support for the surface. The right to work mines is a right of property.² The right of support does not mean that the minerals must be left in their natural state. The owner of the minerals may remove them wholly if he provides other sufficient support. There is no cause of action for the removal of the substratum, unless it produces a subsidence of the surface.³ The nature and extent of the artificial support required depends, of course, very much upon the nature of the superincumbent strata and soil. These may even be such that the mines cannot be worked without causing a subsidence, and accordingly it is held that such mines cannot be worked at all without incurring liability for damages.⁴

But without reference to the nature of the strata above the mines, the rule is that the substituted support must be adequate and effectual.⁵ Lord Campbell, C. J., in a leading case on this point, said: "We are not aware of any principle upon which qualifications could be added to the rule; and the attempt to introduce them would lead to uncertainty and litigation; greater inconvenience cannot arise from this rule, in any case, than that which may be experienced where the surface belongs to one owner, and the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise advantageous to the parties and to the public. Something has been said of a right to a reasonable support for the surface; but we cannot measure out degrees to which the right may extend; and the only reasonable

¹ *Robertson v. Coal Co.*, 172 Pa. St. 622; *Bower v. Peate*, 1 Q. B. D. 321, 566, 571, 33 Atl. Rep. 706, per Williams, J. The case of *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 61 Atl. Rep. 453, does not qualify this rule.

² *Wilson v. Waddell*, 2 App. Cas. 95. ⁴ *Hext v. Gill*, L. R. 7 Ch. 699; *Wakefield v. Duke of Buccleuch*, L. R. 4 Eq. 613.

³ *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Bonomi v. Backhouse*, E. B. & E. 385. ⁵ *Carlin v. Chappel*, 101 Pa. St. 348, 47 Am. Rep. 722; *Williams v. Hay*, 120 Pa. St. 485, 14 Atl. Rep. 379; *Jones v. Wagner*, 66 Pa. St. 429, 5 Am. Rep. 385.

support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level.”¹

601. There is an easement of subjacent support where a building is divided into floors or flats which are owned by different persons; the owner of each upper floor or flat is entitled to vertical support from the lower part of the building, and to share in the benefit of such lateral support as may be of right enjoyed by the building itself.² If the owner of a building grants or leases an upper story, the grantee or lessee is impliedly entitled to the support of the part of the building below, and the grantor impliedly undertakes to do nothing that will derogate from his grant.³ “It is to be assumed as settled that where two or more houses, so constructed as to require mutual support, are conveyed to different owners, or where separate portions of one dwelling become vested in different owners, a right of support, as incident to the property, passes by the conveyance to each grantee, unless excluded by the terms of the grant. Easements of this description are acquired by grant; but in construing the conveyance it is to be presumed that the parties intended to preserve the obviously existing relations and dependencies of the estate, and all those incidents necessary to the present enjoyment of the thing granted are held to pass. There is an obligation upon each adjacent proprietor in favor of the other, beyond what is implied in the maxim which requires every one to use his own so as not to injure his neighbor. The exclusive dominion of each is so far qualified that neither can take away the support of the other, however prudent and careful on his part the act may be.” It was held in the case from which this is quoted that there is no implied obligation between owners of distinct parts of a building which will enable either to maintain an action against the other for mere refusal and neglect to repair his tenement, whereby the plaintiff’s part is injured.⁴

¹ *Humphries v. Brogden*, 12 Q. B. 739, 745.

² *Dalton v. Angus*, 6 App. Cas. 740, 793, per Lord Chancellor Selborne; *Birmingham v. Allen*, 6 Ch. D. 292; *Richards v. Rose*, 9 Exch. 218; *Caledonian R. Co. v. Sprot*, 2 Macq. 449; *Graves v. Berdan*, 26 N. Y. 498; *McConnel v. Kibbe*, 33 Ill. 175, 85 Am.

Dec. 265; *Rhodes v. McCormick*, 4 Iowa, 368, 475, 68 Am. Dec. 663.

³ *Harris v. Ryding*, 5 M. & W. 60, per Parke, B. And see *Humphries v. Brogden*, 12 Q. B. 739, 756.

⁴ *Pierce v. Dyer*, 109 Mass. 374, 376, 12 Am. Rep. 716, per Colt, J. And see *Ottumwa Lodge v. Lewis*, 34 Iowa, 67, 11 Am. Rep. 135.

602. The owner of land has no right to the support of subterranean water. "Although there is no doubt that a man has no right to withdraw from his neighbor the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if for any reason it becomes necessary or convenient for him to do so."¹ In the case from which the quotation is made it appeared that houses had been built on wet land which had not been drained, and that when the adjoining land was sold for building a church and excavations were made for the foundations, the water was drawn from the spongy land adjoining, the surface subsided and cracked, and the buildings upon it were injured. It was held that there was nothing at common law to prevent the owner of land from draining it in such manner as he might deem it necessary or convenient.

603. But if the land rests in part upon quicksand, which is withdrawn by pumping in an excavation upon adjoining land, such withdrawal is a wrong, and the landowner may recover for an injury to his land and buildings occasioned thereby. In a suit against sewerage commissioners authorized to construct a sewer through a street the plaintiff offered to prove that he owned and occupied buildings abutting upon the street; "that the soil there consisted of about three feet of gravel filling upon about ten feet of peat and silt, below which was very fine sand and silt, or quicksand; that the average depth of the trench was about twenty-six feet, and the average width on top about fourteen feet, and on the bottom about twelve feet. The plaintiff also offered to prove that in this sand was a great deal of water; that the trench was kept free from water by means of buckets and pumps; that large quantities of the plaintiff's soil were removed by this means, so that the surface of his premises, being deprived of its subjacent and lateral support, cracked and settled, and his buildings were injured; that the defendants knew, or ought to have known, what was the nature of the soil, and that the construction of the sewer in the manner provided for in the contract would necessarily result in injuring the plaintiff's property in the manner described, unless unusual and extraordinary precautions were taken; and that they were negligent in making the contract without requiring the contractor to take unusual and extraordinary precautions to prevent such injury."

¹ Popplewell v. Hodkinson, L. R. 4 L. Cas. 333; North Eastern R. Co. v. Exch. 248, 251, per Cockburn, C. J.; Elliot, 1 Johns. & H. 145.
Elliot v. North Eastern R. Co., 10 H.

Chief Justice Field, delivering the judgment of the Supreme Court of Massachusetts in this case, said: "Whatever may be true of percolating waters, we think that the defendants had no right to take away the soil of the plaintiff in land which they had not taken under the statutes, and that it is immaterial that the soil was removed by means of pumps from the trench into which it had fallen by its own weight, or had been carried by percolating water. We are unable to distinguish the case from one where the soil falls in from the surface in consequence of an excavation in the adjoining land. The plaintiff, if the facts be as he offered to prove, has been deprived of the lateral support to his land, in consequence of which the quicksand has run from under the surface of his land into the trench, and has been removed by means of pumps, and this has caused the surface to settle and crack. It was the duty of the defendants to prevent this in some manner, if they did not take the plaintiff's land."¹

III. *Application of the Easement of Lateral Support as regards Buildings.*

604. The right of lateral support applies only to the land itself and not to the buildings or other artificial structures.² "If a man

¹ Cabot v. Kingman, 166 Mass. 403, 404, 405, 44 N. E. Rep. 344.

² Dalton v. Angus, 6 App. Cas. 740, L. R. 4 Q. B. D. 162, L. R. 3 Q. B. D. 85; Wyatt v. Harrison, 3 Barn. & Ad. 871; Partridge v. Scott, 3 M. & W. 220; Harris v. Ryding, 5 M. & W. 60, 71, per Parke, B.; Gayford v. Nicholls, 9 Exch. 702; Rogers v. Taylor, 2 H. & N. 828, per Cockburn, C. J.; Transportation Co. v. Chicago, 99 U. S. 635, 645.

Alabama: Moody v. McClelland, 39 Ala. 45, 84 Am. Dec. 770; Myer v. Hobbs, 57 Ala. 175, 29 Am. Rep. 719.

California: Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. Rep. 209; Aston v. Nolan, 63 Cal. 269; Conboy v. Dickinson, 92 Cal. 600, 28 Pac. Rep. 809.

Delaware: Stimmel v. Brown, 7 Houst. 219, 30 Atl. Rep. 996.

Illinois: Quincy v. Jones, 76 Ill. 231,

20 Am. Rep. 243; Guest v. Reynolds, 68 Ill. 478, 18 Am. Rep. 570.

Indiana: Block v. Haseltine, 3 Ind. App. 491, 29 N. E. Rep. 937; Bohrer v. Dienhart Harness Co. (Ind.), 45 N. E. Rep. 668; Moellering v. Evans, 121 Ind. 195, 22 N. E. Rep. 989.

Kansas: Winn v. Abeles, 35 Kan. 85, 10 Pac. Rep. 443

Kentucky: Clemens v. Speed, 93 Ky. 284, 19 S. W. Rep. 660; Covington v. Geyler, 93 Ky. 275, 19 S. W. Rep. 741; Oneil v. Harkins, 8 Bush. 650; Shrieve v. Stokes, 8 B. Mon. 453, 48 Am. Dec. 401.

Maryland: Baltimore & P. R. Co. v. Reaney, 42 Md. 117.

Massachusetts: Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312; Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57.

builds his house at the extremity of his land he does not thereby acquire any right of easement for support or otherwise over the land of his neighbor. He has no right to load his own soil so as to make it require the support of that of his neighbor unless he has some grant to that effect.”¹ One erecting a building on the margin of his own land is regarded as being himself in fault if he has so constructed it that the increased lateral pressure from the building will prevent the adjoining owner from excavating upon his own land to the same extent that he could have done had the building not been erected without endangering the foundation of the building.² “A man who himself builds a house adjoining his neighbor’s land ought to foresee the probable use by his neighbor of the adjoining land; and, by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience.”³ An injury done to a building by reason of an excavation upon the adjoining land made with proper care and

Michigan: *Gildersleeve v. Hammond* (Mich.), 67 N. W. Rep. 519.

Minnesota: *Schultz v. Bower*, 57 Minn. 493, 50 N. W. Rep. 631.

Missouri: *Handlan v. McManus*, 42 Mo. App. 551, affirmed 100 Mo. 124, 13 S. W. Rep. 207; *Larson v. Met. Street R. Co.*, 110 Mo. 234, 19 S. W. Rep. 416; *Victor Min. Co. v. Morning Star Min. Co.*, 50 Mo. App. 525; *Busby v. Holthaus*, 46 Mo. 161; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *Eads v. Gains*, 58 Mo. App. 586.

New Jersey: *Schultz v. Byers*, 53 N. J. L. 442, 22 Atl. Rep. 514, 26 Am. St. Rep. 435; *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49.

New York: *Dorrity v. Rapp*, 72 N. Y. 307; *Marvin v. Brewster Iron M. Co.*, 55 N. Y. 528, 556, 14 Am. Rep. 322; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Radcliff v. Mayor*, 4 N. Y. 195, 53 Am. Dec. 357; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *People v. Canal Board*, 2 Thomp. & Co. 275; *Ketcham v. Newman*, 141 N. Y. 205, 36 N. E. Rep. 197.

Ohio: *Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73.

Pennsylvania: *McGettigan v. Potts*, 149 Pa. St. 155, 24 Atl. Rep. 198, 30 W. N. C. 137.

South Carolina: *Napier v. Bulwinkle*, 5 Rich. 311, 323.

South Dakota: *Ulrick v. Dakota L. & T. Co.*, 2 S. K. 285, 49 N. W. Rep. 1054, 3 S. D. 44, affirmed 51 N. W. Rep. 1023.

Vermont: *Beard v. Murphy*, 37 Vt. 99, 86 Am. Dec. 693; *Graves v. Mattison*, 67 Vt. 630, 32 Atl. Rep. 498.

Virginia: *Stearns v. Richmond*, 88 Va. 992, 14 S. E. Rep. 847; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Stevenson v. Wallace*, 27 Gratt. 77.

¹ *Partridge v. Scott*, 3 M. & W. 220, per Alderson, B. To like effect, Lord Tenderden, C. J., in *Wyatt v. Harrison*, 3 B. & Ad. 871.

² *Farrand v. Marshall*, 19 Barb. 380, 21 Barb. 409; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *Smith v. Hardesty*, 31 Mo. 411; *Louisville & N. R. Co. v. Bonhayo*, 94 Ky. 67, 21 S. W. Rep. 526.

³ *Thurston v. Hancock*, 12 Mass. 220 226, 7 Am. Dec. 57, per Parker, C. J.

skill is *damnum absque injuria*.¹ "While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can, by his own act, enlarge the liability of his neighbor for an interference with this natural right. If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor or dig his foundations so deep, or take such other precautions as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right."²

605. An easement for the support of a building can only be acquired by an express or implied grant or covenant. "If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural."³ It is, of course, incumbent upon the party who claims a right of support for buildings to prove the contract of grant by which such right was acquired. The presumption is against any right of support for buildings or other structures upon the land.

¹ Radcliff v. Mayor, 4 N. Y. 195, 53 Am. Dec. 357; Lasala v. Holbrook, 4 Paige, 169, 25 Am. Dec. 524; Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771; Winn v. Abeles, 35 Kan. 85, 10 Pac. Rep. 443; Clemens v. Speed, 93 Ky. 284, 9 S. W. Rep. 660; Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Charless v. Rankin, 22 Mo. 566, 66 Am. Dec. 642; McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581; Stevenson v. Wallace, 27 Gratt. 77; McGettigan v. Potts, 149 Pa. St. 155, 24 Atl. Rep. 198; Richart v. Scott, 7 Watts, 460, 32 Am. Dec. 779.

² Gilmore v. Driscoll, 122 Mass. 193, 201, 23 Am. Rep. 312, per Gray, C. J.

³ Dalton v. Angus, 6 App. Cas. 740, 792, per Lord Chancellor Selborne. And see North Eastern Ry. Co. v. Elliot, 1 J. & H. 145; North Eastern Ry. Co. v. Crossland, 2 J. & H. 565; Siddons v. Short, 2 C. P. D. 572; Caledonian Ry. Co. v. Sprot, 2 Macq. 449; Lampman v. Milks, 21 N. Y. 505, 514, per Selden, J.; Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581; Stevenson v. Wallace, 27 Gratt. 77; Bonomi v. Backhouse, E. B. & E. 622; Richards v. Rose, 9 Exch. 218.

The vendor of land adjoining other land of his own under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly covenants that he will not use the land retained or permit it to be used in such a manner as to derogate from his grant; and he or his lessee will be enjoined from working the mine within such a distance from his grantee's land as to be reasonably calculated to endanger its stability.¹

If the owner of two houses built together in such a manner as to obviously require mutual support conveys one of them, there is both an implied grant and an implied reservation of mutual support of the two houses, so that the owner of one cannot remove it without protecting the other by some adequate support.²

606. The right to lateral support for a building cannot be acquired by prescription when there is no actual occupancy or adverse user of any part of the land of the adjoining owner. The right cannot be predicated solely upon the fact that the building is a permanent structure, and that it had been permitted to remain in the same position for a sufficient length of time to give title by prescription.³ One has a right to erect a building on his land; he invades no right of the owner of the adjacent land, and the latter has no ground for objecting to the erection and continuance of the building. "No injury was inflicted upon him upon which he could base an action, and, if so, his failure to sue could create no right against him, or easement in or servitude upon his property."⁴ Title by prescription cannot be acquired unless the acts constituting the adverse use are of such a nature as to give

¹ *Siddons v. Short*, 2 C. P. Div. 572. And see *North Eastern Ry. Co. v. Elliot*, 1 J. & H. 145; *North Eastern Ry. Co. v. Crossland*, 2 J. & H. 565.

² *Richards v. Rose*, 9 Exch. 218; *Fox v. Clarke*, L. R. 9 Q. B. 565; *Lemaitre v. Davis*, 19 Ch. D. 281.

³ *Handlan v. McManus*, 42 Mo. App. 551, affirmed 100 Mo. 124, 13 S. W. Rep. 207, overruling *Casselberry v. Ames*, 13 Mo. App. 575; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. Rep. 660; *Sullivan v. Zeiner*, 98 Cal. 346, 33 Pac. Rep. 209, 20 L. R. A. 730; *Gilmore v. Driscoll*,

122 Mass. 199, 207, 23 Am. Rep. 312; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Richart v. Scott*, 7 Watts. 460, 32 Am. Rep. 779; *Mitchell v. Mayor*, 49 Ga. 19, 15 Am. Rep. 669; *Briggs v. Klosse*, 5 Ind. App. 129, 31 N. E. Rep. 208; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581, rejecting dictum to the contrary in *Stevenson v. Wallace*, 27 Gratt. 77; *Napier v. Bulwinkle*, 5 Rich. 311.

⁴ *Sullivan v. Zeiner*, 98 Cal. 346, 33 Pac. Rep. 209, 20 L. R. A. 730, per J.

a cause of action in favor of the person against whom the acts are performed.¹

In a Massachusetts case Chief Justice Gray remarked: "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land, which can be seen or known, or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former."²

In England the rule is that a right of lateral support for a building may be acquired by prescription, in analogy to the doctrine of prescription in relation to ancient lights which prevails there, but not in this country.³ It is also held that buildings belonging to different owners have a right of support from each other by prescription after twenty years of uninterrupted enjoyment.⁴

607. Neither have the owners of ancient buildings which adjoin each other any reciprocal easement of support from each others buildings; but either may remove his own building without liability for damage resulting to the other, provided he gives proper notice of the intended removal and uses reasonable care and caution not to injure the wall of the remaining building.⁵

¹ *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 183, 22 Pac. Rep. 76.

² *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312, Gray, C. J. See, to like effect, the able opinion of Lewis, J., in *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581, and the opinion of Kennedy, J., in *Richart v. Scott*, 7 Watts, 460, 32 Am. Dec. 779; *Handlan v. McManus*, 42 Mo. App. 551.

³ *Dalton v. Angus*, 6 App. Cas. 740; *Angus v. Dalton*, 4 Q. B. D. 162, 3 Q. B. D. 85; *Dodd v. Holme*, 1 Ad. & El. 493, 505; *Humphries v. Brogden*, 12 Ad. & El. N. S. 739; *Wyatt v. Harrison*, 3 Barn. & Ad. 871; *Hide v. Thornborough*, 2 Car. & K. 250, 255; *Partridge v. Scott*, 3 M. & W. 220; *Solomon v. Vintners' Co.*, 4 H. & N. 585, 594; *Bonomi v. Backhouse*, El. B. & E. 622, 9 H. L. Cas. 503; *Rogers v. Taylor*, 2 H. & N. 828. There are dicta to like

effect in several American cases which have since been rejected as not in accordance with the settled rule of law in this country, as in *Lasala v. Holbrook*, 4 Paige, 169, 173, 25 Am. Dec. 524; *Stimmel v. Brown*, 7 Houst. 219, 30 Atl. Rep. 996; *Richart v. Scott*, 7 Watts, 460, 32 Am. Dec. 779; *Stevenson v. Wallace*, 27 Gratt. 77; *Aston v. Nolan*, 63 Cal. 269.

⁴ *Lemaitre v. Davis*, L. R. 19 Ch. Div. 281; *Brown v. Windsor*, 1 Cr. & J. 20; *Solomon v. Vintner's Co.*, 4 H. & N. 585.

⁵ *Clemens v. Speed*, 93 Ky. 284, 19 S. W. Rep. 660, 19 L. R. A. 240, per Holt, C. J. "It is said, however, that a right may be acquired in the form of an easement to support from an adjoining building; that the right of each owner in the use of his own property is then so far qualified that he cannot take away

608. One is not restricted from mining near his neighbor's land because he has erected heavy structures near the division line; but he is bound to observe proper care not to cause the adjoining proprietor more damage than is fairly incident to the prosecution of the work.¹

Where one in conducting his mining operations has omitted to leave the pillars and other supports necessary to insure the absolute safety of the super-incumbent surface, on which he has heavy structures and operates machinery, he is not entitled to lateral support from his neighbor's mines, and cannot enjoin such neighbor from mining, with ordinary care, up to the line between them, where the material is such that a perpendicular wall will sustain its own weight and the natural pressure thereon by the power of its own coherence.²

609. If one builds a house on his own land, which has previously been excavated for mining purposes, he does not acquire a right of support for the house from the adjoining land of another. Therefore, the owner of the adjoining land is not liable to an action if he works mines under his own land so near its boundary as to cause the excavated land on which the house stands to sink, and the house to be thereby injured.³ And so, one taking coal from his own land is not liable for a subsidence caused in the surface of another's land which is separated from the colliery by an intermediate piece of land from under which the coal had been worked out some years before by a third party, it being admitted that if the intermediate land had been in its natural state, no injury would have been caused by the subsequent excavation of the coal. One has a right to work a mine up to the limit of his own land, and this

this support, however prudent and careful he may act in doing so, without furnishing absolute protection in some way; and that this right of the adjoining owner is absolute in its character. We cannot assent to such a doctrine. It would be a rule at war with reason and justice. It would make the owner an insurer of his neighbor's house in case he desired to take down his own, or was compelled to remove it owing to its condition. It would make him liable for all damage, however carefully he may have acted. It would, in great

measure, prevent all improvement. Whatever may be the English doctrine, such a rule has not been, and should not be, adopted in a changing, growing country like this one, any more than the doctrine of ancient lights, which has been rejected." See also *Richards v. Rose*, 9 Exc. 218.

¹ *Victor Mining Co. v. Morning Star Min. Co.*, 50 Mo. App. 525.

² *Victor Mining Co. v. Morning Star Min. Co.*, 50 Mo. App. 525.

³ *Partridge v. Scott*, 3 M. & W. 220.

right cannot be diminished by any act done by the owner of the adjoining land, or by a third person for whose action the owner of the mine is not responsible.¹

IV. *Care and Skill in Excavating.*

610. In the exercise of proper care a party excavating near a building on land of another is required to give notice to the owner of such building of the intended improvement, unless such owner has actual knowledge of the work proposed.² "Where the danger of loss in doing a legal act is not equally balanced we should lean to that side which most needs protection. Here a mere notice, which can cause but little trouble to one who is honestly exercising his right of excavating his land next to his neighbor's house, may enable the receiver of notice to shore or prop his walls to prevent its falling, or it may lead to some arrangement by which neither will be injured. It is more than a mere neighborly courtesy to give such notice, because it involves the right of one man to assert his right, regardless of the injury he may cause to his neighbor without such warning."³

One who makes an excavation upon his own land deeper than the foundation of the building upon an adjoining lot, without notifying the owner of the building to protect his property, is liable for the fall of the foundation wall or for an injury to the wall of the building by his failure to use ordinary care and diligence to protect it.⁴

¹ Birmingham v. Allen, 6 Ch. D. 284.

² Massey v. Goyder, 4 Carr. & P. 161; Dodd v. Holme, 1 Adol. & E. 493; Peyton v. London, 9 B. & C. 725; Chadwick v. Trower, 8 Scott, 1; Walters v. Pfeil, 1 Moo. & M. 362; Schultz v. Byers, 53 N. J. L. 442, 22 Atl. Rep. 514; Larson v. Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. Rep. 416; Lasala v. Holbrook, 4 Paige, 169, 173, 25 Am. Dec. 524; People v. Canal Board, 2 T. & Co. 275; Shafer v. Wilson, 44 Md. 268; Winn v. Abeles, 35 Kan. 85, 92, 10 Pac. Rep. 443; Block v. Haseltine, 3 Ind. App. 491, 29 N. E. Rep. 937; Covington v. Geyler, 93 Ky. 275, 19 S. W. Rep. 741; Clemens v. Speed, 93 Ky. 284, 19 S. W. Rep. 660, 19 L. R. A. 240; Shrieve v. Stokes, 8 B. Mon. 453, 48

Am. Dec. 401; Aston v. Nolan, 63 Cal. 269; First Nat. Bank v. Villegra, 92 Cal. 96, 28 Pac. Rep. 97; Ulrick v. Dakota L. & T. Co., 2 S. Dak. 285, 3 S. D. 44, 49 N. W. Rep. 1054, affirmed 51 N. W. Rep. 1023.

³ Schultz v. Byers, 53 N. J. L. 442, 446, 22 Atl. Rep. 514, per Scudder, J. "The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or, if there be difficulty in finding or serving it on him, then it may be given to the tenant or occupant who is interested in protecting the property."

⁴ Spohn v. Dives, 174 Pa. St. 474, 34 Atl. Rep. 192. See Novotny v. Danforth (S. D.), 68 N. W. Rep. 749.

Where a landowner, excavating up to the foundation wall of his adjoining owner, obstructs the street gutter in such a way that the water is cast into the adjoining owner's cellar, with the effect of causing the wall to fall, he is liable therefor, though he did not foresee the result which would follow the obstruction of the gutter, and though the foundation wall was weak and easily disturbed.¹

611. But if it appears that the damages done to the adjoining land by an excavation was in no way caused by the weight of a house built upon the damaged land, it is immaterial whether or not the owner of the land excavated gave the co-terminous owner previous reasonable notice of his intention to do the excavating, but the only question to be considered is, whether or not the former took reasonable precautions to sustain the land of the latter.²

612. It is the duty of the owner of a building to protect it from injury by excavations upon the adjoining land, upon receiving notice of any intended excavation which would naturally result in an injury to the building.³ "It is well settled that a landowner cannot, by changing the natural condition of his soil, take away from his neighbor the right to the use and enjoyment of his land to the full extent that he might have enjoyed it had no such change been made; and if he does he can recover damages for any injury he may sustain by reason of the exercise by his neighbor of any of his original rights, unless they be exercised in an unskillful, care-

¹ *Bohrer v. Dienhart Harness Co.* (Ind.), 45 N. E. Rep. 668. "The flow of water was produced by the obstruction of the gutter, which was caused by piling therein the old brick from a building formerly upon appellant's lot, thus entirely blocking up the gutter. That this water was the immediate cause of the accident is expressly found by the court, and to this finding we must give effect in passing upon the correctness of the conclusions of law. It is true that it is also found that, had the wall been well constructed, and of usual strength, it would not have yielded to the force of the water; yet, be that as it may, and whatever other cause might have produced the same results, it is a fact that it was the water, and not something else, which did pro-

duce the disaster in this instance." Per Gavin, J.

² *Conboy v. Dickinson*, 92 Cal. 600, 28 Pac. Rep. 809; *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. Rep. 937.

³ *Peyton v. St. Thomas's Hospital*, 4 Man. & Ry. 625; *Peyton v. London*, 9 B. & C. 725; *Walters v. Pfeil, Moo. & M.* 362; *Trower v. Chadwick*, 3 Bing. N. R. 334; *Massey v. Goyder*, 4 C. & P. 161; *Schultz v. Byers*, 53 N. J. L. 442, 22 Atl. Rep. 514; *Shafer v. Wilson*, 44 Md. 268; *Eads v. Gains*, 58 Mo. App. 586; *Larson v. Met. St. Ry. Co.*, 110 Mo. 234, 19 S. W. Rep. 416, 16 L. R. A. 330; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *Covington v. Geyler*, 93 Ky. 275, 19 S. W. Rep. 741; *Oneil v. Harkins*, 8 Bush, 650; *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401.

less, or negligent manner, or unless, being reasonably certain that injury would result from his acts, such neighbor failed to apprise him of his intention, or to afford him an opportunity to use proper preventives."¹

The duty of the owner of the building imperiled by the digging on the adjoining land to protect his property begins upon his receiving notice of the intended digging, though personal knowledge of the progress of the intended work is equivalent to notice.²

One cannot plead in justification of an injury to his neighbor's land a custom of a particular place that the party whose land is in danger from an excavation of contiguous land shall himself furnish protection against injury from such excavation, unless he shows that the custom has been established so long that the memory of man runneth not to the contrary. Such a custom to be effectual must have its origin in common consent and must be undisputed. A conflict of testimony as to the existence of the custom repels the idea of the custom.³

613. One making an excavation is not required to give formal notice to the adjoining owner, if the latter has, in fact, knowledge of the intended excavation. This is undoubtedly the common-law rule,⁴ and it is the rule under a statute which requires the giving of "reasonable notice" of the intended excavation. "Any notice, therefore, that brings to the knowledge of the other party that the co-terminous owner intends to excavate his lot, and to erect a building thereon, in time to enable such party to make the needed preparation to protect his property, would seem to be sufficient. * * * Undoubtedly, the better practice would be to give formal written notice; but as the statute does not in terms require written

¹ *Oneil v. Harkins*, 8 Bush, 650, 653, per Lindsay, J. See also *Covington v. Geyler*, 93 Ky. 275, 19 S. W. Rep. 741; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. Rep. 660.

² *Larson v. Metropolitan St. Ry. Co.*, 110 Mo. 234, 19 S. W. Rep. 416; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642.

³ *Stimmel v. Brown*, 7 Houst. 219, 30 Atl. Rep. 996.

⁴ *Schultz v. Byers*, 53 N. J. L. 442, 22 Atl. Rep. 514, decided in 1891, where the Supreme Court of New Jersey held

that, without a statute, notice was necessary, the court saying: "The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or, if there be difficulty in finding or serving it on him, then it may be given to the tenant or occupant who is interested in protecting the property. Where it can be shown that such owner had knowledge of the improvement that was about to be made, it would not be necessary to prove a formal notice given to him."

notice, a verbal notice, or such acts of preparation for building as would clearly apprise the adjoining owner that the co-terminous owner was about to excavate his lot, and erect a building thereon, in time to enable the party to make all necessary preparation to protect his property, would be sufficient."¹

614. Ordinary care and skill must be used in such case and a liability for damages arises if any injury occurring to the adjoining building from a lack of such care and skill. If the owner of the building endangered by the proposed excavation has received proper notice, the party making the excavation is responsible only for actual or positive negligence in the manner of doing the work.² It is not required of him to use the same care that a prudent man would exercise in similar circumstances. Such a standard of care was held to be too high on the part of an excavating proprietor in a leading American case.³

¹ *Novotny v. Danforth* (S. D.), 68 N. W. Rep. 749. And see *Ulrick v. Trust Co.*, 3 S. D. 44, 51 N. W. 1024; *Dodd v. Holme*, 11 Ad. & El. 493; *Bradbee v. Christ's Hospital*, 4 M. & G. 714; *Humphries v. Brogden*, 12 Q. B. 739; *Chadwick v. Trower*, 6 Bing. N. R. 1; *Massey v. Goyder*, 4 Car. & P. 161; *Walters v. Pfeil*, Moo. & M. 362, 365; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Jeffries v. Williams*, 5 Exch. 792; *Dixon v. Wilkinson*, 2 McAr. 425.

Alabama: *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Myer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719.

Indiana: *Moellering v. Evans*, 121 Ind. 195, 22 N. E. Rep. 989; *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. Rep. 937.

Kansas: *Leavenworth Lodge v. Byers*, 54 Kan. 323, 38 Pac. Rep. 261; *Winn v. Abeles*, 35 Kan. 85, 10 Pac. Rep. 443.

Kentucky: *Watson Lodge v. Drake* (Ky.), 29 S. W. Rep. 632; *Covington v. Geyler*, 93 Ky. 275, 19 S. W. Rep. 741; *Shrieve v. Stokes*, 8 B. Mon. 453.

Maryland: *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 130; *Shafer v. Wilson*, 44 Md. 268.

Massachusetts: *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771.

Michigan: *Gildersleeve v. Hammond* (Mich.), 67 N. W. Rep. 519.

Missouri: *Victor Min. Co. v. Morning Star M. Co.*, 50 Mo. App. 525; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *Eads v. Gains*, 58 Mo. App. 586; *Larson v. Met. Street R. Co.*, 110 Mo. 234, 19 S. W. Rep. 416, 16 L. R. A. 330.

New York: *Dorrity v. Rapp*, 72 N. Y. 307; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Austin v. Hudson River R. Co.*, 25 N. Y. 334; *People v. Canal Board*, 2 Thomp. & C. 275.

² *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. Rep. 416; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. Rep. 660; *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401.

³ *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642.

In this case it was said that "while an owner would be responsible for all damage caused by reason of an excavation having been negligently made, the instruction that he was bound to use such care and caution as a prudent

The rule in regard to negligence has been stated as a summary of the English authorities: "That an action for such negligence will be supported if it appears that the defendant could have conducted his operations according to some other reasonable and usual method, which would have materially diminished the risk to the plaintiff without materially increasing the burden or expense to himself."¹

615. Liability for an injury to a neighbor's building by reason of excavations near his land arises only from failure to exercise due care and skill in making the excavation. This is well expressed in a leading Massachusetts case, where the court say:² "For an injury to buildings which is unavoidably incident to the depression or slide of the soil upon which they stand, caused by an excavation of a pit on adjoining land, an action can only be maintained when a want of due care and skill, or positive negligence, has contributed to produce it." To like effect the Supreme Court of Illinois said: "If injury is sustained to a building in consequence of the withdrawal of the lateral support of the neighboring soil, when it has been withdrawn with reasonable skill and care to avoid unnecessary injury, there can be no recovery; but if injury is done the building by the careless and negligent manner in which the soil is withdrawn, the owner is entitled to recover to the extent of the injury thus occasioned."³ In a recent decision by the Supreme Court of Michigan the law is well stated in the following propositions:⁴ "1. While a landowner has the undoubted right to excavate close to the boundary line, he must take reasonable precautions to prevent his neighbor's soil from falling. 2. If he has taken such reasonable precautions, and yet the soil falls from its own pressure, he is still liable for injury to the land, but not for any injury to the superstructures. 3. If the pressure of the superstructure causes the land to fall, he is not liable either for injury to the land or superstructure."

If one excavates on his own land near his boundary line so that

man, experienced in such work, would have exercised if he had been himself the owner of the building, was erroneous, and tended to mislead, as one who is proprietor of both contiguous lots might prudently subject himself to expense and inconvenience for the protection of his building that could not

be justly imposed upon one making excavations upon an adjoining lot."

¹ Banks' Law of Support, 66.

² *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771, per Merrick, J.

³ *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243.

⁴ *Gildersleeve v. Hammond* (Mich.), 67 N. W. Rep. 519, per Grant, J.

his neighbor's house is in danger, and the owner, for that reason, takes it down, he can recover no damages against his neighbor on that account; but if the natural soil of his land falls into the excavation made by his neighbor, he is entitled to damages for such injury.¹

In order to recover for the falling of land upon which there are buildings, it must appear that the falling was not occasioned by the pressure of the buildings, but that the land in its natural state would have fallen by reason of the excavation of the adjoining premises.²

An owner of land abutting on an alley, who, in excavating, constructs a retaining wall inadequate to support the alley, which gives way and injures the sidewalk of the opposite owner, is not liable for the injury, in the absence of negligence.³

616. One is not required to protect his neighbor's building at his own expense when excavating near such building. After having given proper notice of his intention to make the excavation the party making it is under no obligation to shore up, brace and protect a building on the adjoining land.⁴

A decision in conflict with the general rule was recently rendered in Michigan, where it was held that the failure of the party making the excavation to protect his neighbor's building, when this could have been done at little expense, renders him liable for the damages to both the land and the building. The court said: "If he fails to take such reasonable precautions to protect his neighbor's soil, and to preserve it in its natural state, he is liable for the injury to both the land and the superstructure, if the pressure of the superstructure did not cause the land to fall, and it fell in consequence of the failure to take such reasonable precautions. * * * One may

¹ *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57.

² *Busby v. Holthaus*, 46 Mo. 161. But an ordinary fence is not such a structure as will, by reason of the additional weight it may add to the soil, deprive the owner of the right to recover for loss or injury to his realty. *Oneil v. Harkins*, 8 Bush, 650.

³ *United States v. Peachy*, 36 Fed. Rep. 160. See *Mairs v. Manhattan Real Est. Assoc.*, 15 J. & S. 31.

⁴ *Walters v. Pfeil*, *Moody & M.* 362; *Massey v. Goyder*, 4 Car. & P. 161;

Peyton v. London, 9 B. & C. 725; *Shear & R. Neg.*, § 497; *Trower v. Chadwick*, 3 Bing. N. R. 334; *Chadwick v. Trower*, 6 Bing. N. R. 1; *Dorrity v. Rapp*, 72 N. Y. 307; *Aston v. Nolan*, 63 Cal. 269; *First Nat. Bank v. Villegra*, 92 Cal. 96, 28 Pac. Rep. 97; *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. Rep. 937; *McMillen v. Watt*, 27 Ohio St. 306; *Shafer v. Wilson*, 44 Md. 268.

See also dissenting opinion of Hooker, J., in *Gildersleeve v. Hammond* (Mich.), 67 N. W. Rep. 519.

not deliberately undermine my building, and then avoid the consequences by saying to me, 'You might have protected it.'"¹

617. In determining whether a party has been guilty of carelessness in excavating his own land, reference may be had to what is usually done by other builders in similar cases.² Whether there was negligence or unskillfulness in the performance of the work is in every case a question for the jury.³ Where the person excavating undertakes to protect the adjacent wall by underpinning it, he is bound to use reasonable care; and whether the injury resulted from want of such care, or from the sandy character of the ground, is a question for the jury.⁴

The work of excavating must be prosecuted with reasonable diligence, and a failure in this respect might be regarded as negligence. It must be prosecuted with the diligence good builders are accustomed to employ in similar circumstances.⁵

Where an owner of land excavated his land to a depth of forty feet below the surface, at a season of the year when heavy rains might be expected, leaving the bank with a steep slope and stopping his excavation only four feet from the division line, no such reasonable precaution to sustain the adjacent land is shown as will relieve the excavating owner from liability for damage to the adjacent land, caused by a sliding of the land.⁶

618. The question of negligence is one for the jury where there is evidence enough to justify the submission. Thus the evidence was properly submitted to the jury where it tended to show that the defendants carried their excavations very considerably beneath the level of the foundations of the plaintiff's adjoining building; that some of the soil underneath plaintiff's foundation fell out; that no measures whatever looking towards the support of plaintiff's wall were taken by defendants until part of the soil supporting it on defendants' side had been removed, nor until the wall showed signs of giving way, and the chimney attached to the kitchen had

¹ *Gildersleeve v. Hammond* (Mich.), 67 N. W. Rep. 519, Hooker, J., dissenting.

² *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. Rep. 937; *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401.

³ *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49.

⁴ *Covington v. Geyler*, 93 Ky. 275, 19 S. W. Rep. 741.

⁵ *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. Rep. 937.

⁶ *Conboy v. Dickinson*, 92 Cal. 600, 28 Pac. Rep. 809.

actually fallen, that afterwards two horizontal props were run in under the brick part of the wall, upheld on defendant's property and in plaintiff's cellar by perpendicular posts; that at some time two or three or more other props were placed against the wall slanting upwards from defendants' property; that neither of these expedients taken alone, nor both of them applied simultaneously, were reasonably sufficient, according to described customary methods, to protect the structure from sinking, and that the structure was injured by sinking.¹

The rule that one excavating with due care on his own soil will not be liable for injuries thereby occasioned to an adjoining owner has no application to a case where the excavation is effected by blasting out rock with an explosive so powerful as to break the windows, loosen the walls, and injure the furniture of adjoining owners, by atmospheric concussion.²

619. One excavating near the boundary of his neighbor's land cannot relieve himself of responsibility by having the work done by an independent contractor. Depriving the adjoining land of lateral support is a wrongful act and all who unite in the act are wrongdoers and responsible in damages.³ A contractor who excavates land without providing for the support of the land adjoining is jointly liable with the landowner, who causes the excavation to be made, for damages caused by the falling of the soil of the adjoining land for want of support, although the soil does not fall until a contract has been completed and the work accepted.⁴ In the lead-

¹ Spohn v. Dives, 174 Pa. St. 474, 34 Atl. Rep. 192.

² Morgan v. Bowes, 17 N. Y. Supp. 22, 62 Hun, 623; Denken v. Canavan, 39 N. Y. Supp. 1078, where the blasting loosened the soil of the adjoining land so as to cause a clothes-pole to fall.

³ Dalton v. Angus, L. R. 6 App. Cas. 740; Angus v. Dalton, 4 Q. B. D. 162, 3 Q. B. D. 85; Hardaker v. Idle Dist. Council [1896], 1 Q. B. 321; Bower v. Peate, 1 Q. B. D. 321; Lemaitre v. Davis, 19 Ch. D. 281; Hughes v. Percival, 8 App. Cas. 443; Gayford v. Nicholls, 9 Exch. 702, holding otherwise where there was no right of support; Stevenson v. Wallace, 27 Gratt. 77, 91;

Cabot v. Kingman, 166 Mass. 463, 44 N. E. Rep. 344; Green v. Berge, 105 Cal. 52, 38 Pac. Rep. 539, overruling Aston v. Nolan, 63 Cal. 269, so far as contrary; Bohrer v. Dienhart Harness Co. (Ind.), 45 N. E. Rep. 668; Palmer v. Silverthorn, 32 Pa. St. 65; Dorrity v. Rapp, 72 N. Y. 307; Watson Lodge v. Drake (Ky.), 29 S. W. Rep. 632; Kopp v. Northern Pac. R. Co., 41 Minn. 310, 43 N. W. Rep. 73; Larson v. Metropolitan Street R. Co., 110 Mo. 234, 19 S. W. Rep. 416, 16 L. R. A. 330.

Contra. — See Myer v. Hobbs, 57 Ala. 175, 29 Am. Rep. 719; McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

⁴ Green v. Berge, 105 Cal. 52, 38 Pac.

ing case of *Dalton v. Angus*, in the House of Lords, the law is clearly stated by Lord Blackburn: "Ever since *Quarman v. Burnett*,¹ it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to permit it."²

But for damages occurring through the mere collateral negligence of the contractor or his workmen in doing the work he alone is liable.³

One who directs and controls the work of excavating upon his land adjoining the lot of another upon which there is a building is liable to the owner of such building for the loss occasioned by work so carelessly done that the building is destroyed.⁴

The question of liability depends upon the construction of the contract with the contractor. If the principal retains the right to control and direct the work, he is liable for the acts of the contractor, even for injuries occasioned by his negligence in doing the work.⁵

V. *The Damages Recoverable.*

620. The damages recoverable for the withdrawal of lateral support to land are limited to the injury to the land itself, and are not enhanced by any injury done to the building upon the land,

Rep. 539; *Lemaitre v. Davis*, 19 Ch. D. 281.

¹ 6 M. & W. 499.

² *Dalton v. Angus*, 6 App. Cas. 740, 829, citing *Hole v. Railway Co.*, 6 Hurl. & N. 488; *Pickard v. Smith*, 10 C. B. N. S. 470; *Tarry v. Ashton*, 1 Q. B. D. 314. Followed and approved in *Cabot v. Kingman*, 166 Mass. 403, 44 N. E. Rep. 344.

³ *Butler v. Hunter*, 7 H. & N. 826; *Dalton v. Angus*, 6 App. Cas. 740, 829. And see *Cabot v. Kingman*, 166 Mass. 403, 406, 44 N. E. Rep. 344.

⁴ *Watson Lodge v. Drake* (Ky.), 29 S. W. Rep. 632.

⁵ *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287.

provided the work was done with proper and ordinary care and skill.¹

The rule is different, however, in England. There, if it appears that the weight of the building in no way contributed to the falling of the earth, the damage done to the building may be taken into consideration in estimating the damages.² Where the working of mines has caused a subsidence of the adjacent land, the owner is entitled to recover for the damage to buildings thereon provided their weight did not contribute to the subsidence.³

621. The measure of damages is the diminution of the value of the land in consequence of its falling from the withdrawing of lateral support, and not the cost of restoring the land to its former condition, nor its diminished market value.⁴

¹ *Smith v. Thackerah*, L. R. 1 C. P. 564; *Gayford v. Nicholls*, 9 Exch. 702; *Partridge v. Scott*, 3 M. & W. 220; *Wyatt v. Harrison*, 3 B. & Ad. 871.

Alabama: *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770.

Illinois: *Quincy v. Jones*, 76 Ill. 241, 20 Am. Rep. 243.

Indiana: *Moellering v. Evans*, 121 Ind. 195, 22 N. E. Rep. 989.

Kansas: *Winn v. Abeles*, 35 Kan. 85, 10 Pac. Rep. 443.

Kentucky: *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401.

Massachusetts: *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771.

Missouri: *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642.

New Jersey: *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49.

New York: *Dorrity v. Rapp*, 72 N. Y. 307; *Farrand v. Marshall*, 19 Barb. 380; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *Hay v. Cohoes Co.*, 2 N. Y. 159, 162, 51 Am. Dec. 279.

Pennsylvania: *McGettigan v. Potts*, 149 Pa. St. 155, 24 Atl. Rep. 198;

Richart v. Scott, 7 Watts. 460, 32 Am. Dec. 779.

South Dakota: *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054, 3 S. D. 44, affirmed 51 N. W. Rep. 1023.

Vermont: *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283; *Beard v. Murphy*, 37 Vt. 99, 102, 86 Am. Dec. 693.

² *Brown v. Robins*, 4 Hurl. & N. 186; *Stroyan v. Knowles*, 6 Hurl. & N. 454; *Hunt v. Peake*, Johns. Ch. (Eng.) 705; *Wyatt v. Harrison*, 3 B. & Ad. 871, 876; *Siddons v. Short*, 2 C. P. D. 572; *Stearns v. Richmond*, 88 Va. 992, 14 S. E. Rep. 847.

See, however, *Smith v. Thackerah*, L. R. 1 C. P. 564.

³ *Stroyan v. Knowles*, 6 Hurl. & N. 454.

⁴ *Jones v. Gooday*, 8 M. & W. 146; *Transportation Co. v. Chicago*, 99 U. S. 635; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Williams v. Missouri Furnace Co.*, 13 Mo. App. 70; *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285, 3 S. D. 44, 49 N. W. Rep. 1054, affirmed 51 N. W. Rep. 1023; *Mueller v. St. Louis & Iron M. R. Co.*, 31 Mo. 262; *Moellering v. Evans*, 121 Ind. 195, 22 N. E. Rep. 989,

In other cases, however, it has been held that the measure of damages is the amount of the injury actually done to the land by its falling or sinking away, not the diminution in value of the lot. "To hold that the proper measure of damages is the diminution in the value of the lot, as affected by the acts of the defendant, is practically to hold that the measure is the difference between the market value of the land before and after the injury, which, as we have before seen, and have recently decided, is not the true measure in litigations between private parties. In the ordinary actions of trespass upon land the measure is the amount of the injury actually done to the plaintiff's land, and we see no reason to depart from that rule in this case."¹

It has also been held that if one, by excavating his own land, causes the land of his neighbor to cave in, the latter may recover the amount required to restore his property to its former condition, with as effectual lateral support as it previously had.²

622. The general doctrine of damages for withdrawing lateral support does not apply where the land of both adjoining owners was located for the purpose of washing it away to obtain the gold in the gravel; therefore, if one owner, in washing away the gravel on his own land by the hydraulic process so that the bank of the adjoining owner falls and is washed away and the gold extracted from it, the party so mining and taking the gold is liable only for the amount of gold taken from the gravel that fell from his neighbor's claim, less the cost of mining it; if the value of the gold was less than the necessary cost of extracting it, no damages are recoverable.³

623. If one negligently excavates on his own land and injures his neighbor's building, he is liable for damages, not only for the

6 L. R. A. 449; *Karst v. St. Paul, S. & T. F. R. Co.*, 22 Minn. 118; *Barnett v. St. Anthony Falls W. P. Co.*, 33 Minn. 265, 22 N. W. Rep. 535; *Kopp v. Northern Pac. R. Co.*, 41 Minn. 310, 43 N. W. Rep. 73; *Schultz v. Bower*, 57 Minn. 493, 50 N. W. Rep. 631, 66 N. W. Rep. 139.

In *Snarr v. Granite Curling & Skating Co.*, 1 Ont. 102, judgment was given for the restoration of the land.

¹ *McGettigan v. Potts*, 149 Pa. St. 155, 162, 24 Atl. Rep. 198, per Green,

J. And see *Chicago, K. & W. R. Co. v. Willits*, 45 Kan. 110, 25 Pac. Rep. 576.

² *Hide v. Thornborough*, 2 Carr. & K. 250, *Burke, B.*, saying, however, that the jury ought not to give the plaintiff a new house for an old one. *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401; *Stimmel v. Brown*, 7 Houst. 219, 30 Atl. Rep. 996; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642.

³ *Hendricks v. Spring Valley M. Co.*, 58 Cal. 190, 41 Am. Rep. 257.

injury to the soil, but also for any injury to the buildings upon it. Though not required to support his neighbor's building, he is required to make his excavation with reasonable care and skill, and is liable for an injury to his neighbor's building occasioned by any want of reasonable care and skill on his part.¹

Where one erected a building on a hillside near a railroad already constructed, and the railroad company afterwards made excavations and blasted rock in widening its road, and the soil slid from the neighboring land causing the foundation of the building to give way, it was held that if the weight of the building prevented the railroad company from widening its track in the exercise of ordinary prudence, the owner of the building could not recover; but if the injury was caused by the negligence of the railroad company in doing the work, damages could be recovered not only for the injury to the soil but for the injury to the building.²

When the damages recoverable include the superstructure as well as the soil in consequence of the added element of negligence in making the excavation, the measure of damages is the same, as in other cases, the diminished value of the property injured, and not the cost of repairing it.³

624. But one who negligently excavates his own land, adjoining his neighbor's land, is not liable for an injury to his neighbor's feelings, in addition to the injury to his land and to a stone wall and trees upon the land, although there was gross carelessness in the digging and the land was designed for a burial-place. "The negligence of defendant consisted in the act of his servants in carelessly digging upon his land near the land of the plaintiff. It was a careless act; and, however gross the carelessness, the court found no wrong, and nothing to affect or give character to the act, except want of care. There was not found, directly or by implication, any act or word of insult or contumely — any intentional violation of the plaintiff's rights — any 'wilful misconduct, or that entire

¹ *Dodd v. Holme*, 1 Ad. & El. 493; *Mon.* 453, 48 Am. Dec. 401; *Myer v. Peyton v. Mayer*, 9 B. & C. 725; *Louisville & N. R. Co. v. Bonhayo*, 94 Ky. 67, 21 S. W. Rep. 526; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Shafer v. Wilson*, 44 Md. 268; *Shrieve v. Stokes*, 4 B.

² *Louisville & N. R. Co. v. Bonhayo*, 94 Ky. 67, 21 S. W. Rep. 526.

³ *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285, 3 S. D. 44, 49 N. W. Rep. 1054, affirmed 51 N. W. Rep. 1023.

want of care which would raise the presumption of a conscious indifference to consequences.’¹ Waiving the question whether the rule of damages given would have been proper had the injury been inflicted with a manifest disregard of the plaintiff’s rights, and with a purpose to injure him exhibited, it is sufficient to say that there was nothing in the nature of the injury to the plaintiff’s property which involved injury to his feelings, and nothing in the circumstances attending it, as shown by the evidence and found by the court, which could give him a right to damages for wounded feelings.”²

625. If the party claiming damages by reason of an excavation upon his neighbor’s land has himself done any act contributory to the injury, he cannot recover.³ If there were defects in the foundation of the building and it fell into the adjoining excavation in consequence of these defects, the excavation having been made with proper and ordinary care and diligence, the owner of the building cannot recover for the injury against the party making the excavation.⁴

626. But it is no defense that the injury would not have occurred but for the act of a third person in erecting buildings upon his own land. “The absolute and unqualified right of property which vests in the owner of land cannot be diminished or lawfully affected by the acts or proceedings of strangers in the use and appropriation of that which belongs to them; and therefore he who, in the execution of an enterprise for his own benefit, changes the natural condition of the parcel of territory to which he has title, and thereby takes away the lateral support to which the owner of the adjoining estate is entitled, cannot exonerate himself from responsibility by showing that the particular injury complained of would not have occurred if other persons had never made alterations in or improvements upon their respective closes.”⁵

627. The cause of action for the removal of support accrues when damage is actually sustained, and not upon the removal of support when no damage has ensued. No action can be sustained

¹ Milwaukee & St. P. R. Co. v. Arms, Barb. 409; Smith v. Hardesty, 31 Mo. 91 U. S. 489.

² White v. Dresser, 135 Mass. 150, 46 Am. Rep. 454.

³ Partridge v. Scott, 3 M. & W. 220; Farrand v. Marshall, 19 Barb. 380, 21

411.
⁴ Richart v. Scott, 7 Watts, 460, 32 Am. Dec. 779.

⁵ Foley v. Wyeth, 2 Allen, 131, 134, 79 Am. Dec. 771, per Merrick, J.

merely for the removal of support. The statute of limitations does not begin to run against such action until actual damage has occurred. This matter was settled in an important case in the House of Lords, affirming the judgment of the Court of Exchequer Chamber, in which Willes, J., said:¹ “There is no doubt that for an injury to a right an action lies; but the question is, what is the plaintiff’s right? Is it that his land should remain in its natural state, unaffected by any act done in the neighboring land, or is it that nothing should be done in the neighboring land from which a jury would find that damage might possibly accrue? There is no doubt that in certain cases an action may be maintained, although there is no actual damage. The rule laid down by Serjeant Williams² is that, whenever an act injures another’s right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of the right, without proof of any specific damage. This is a reasonable and sensible rule; but it has no application to the present case, for the act of the defendant in getting the coal would be no evidence in his favor as to any future act. Getting the coal was an act done by him in his own soil, by virtue of his dominion over it. If the question were unaffected by decision, we cannot but think that the contention on the part of the plaintiffs in error is correct. That on behalf of the defendant is, that the action must be brought within six years after the excavation is made, and that it is immaterial whether any actual damage has occurred or not. The jury, according to this view, would have, therefore, to decide upon the speculative question whether any damage was likely to arise; and it might well be that in many cases they would, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur, when the most serious injury afterwards might in fact occur, and in others find and give large sums of money for apprehended damage, which, in point of fact, never might arise. This is certainly not a state of the law to be desired. On the other hand, the plaintiffs in error rely upon the ordinary rule that *damnum* and *injuria* must concur to confer a right of action, and that, although only one action could be maintained for damage in respect of such claim, nevertheless it would

¹ Bonomi v. Backhouse, E. B. & E. 622, 657; Backhouse v. Bonomi, 9 H. L. Cas. 503, overruling Nicklin v. Williams, 10 Exch. 259. See also, sustaining the text, Roberts v. Read, 16 East, 215.
² Mellor v. Spateman, 1 Wms. Saund. 343, 346 b, in note 2.

be essential that some damage should have happened before a defendant was made liable for an act done in his own land. Actions upon contract and actions of trespass for direct injuries to the land of another are clearly distinguishable. * * * We are not insensible to the consideration that the holding damage to be essential to the cause of action may extend the time during which persons working minerals and making excavations may be made responsible; but we think that the right which a man has is to enjoy his own land in the state and condition in which nature has placed it, and also to use it in such manner as he thinks fit, subject always to this: that, if his mode of using it does damage to his neighbor, he must make compensation. Applying these two principles to the present case, we think that no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff; and that the cause of action did accrue when the actual damage first occurred.”¹

628. A new fall of the land after a recovery or settlement for a previous fall is a new cause of action which is not barred by the previous recovery or settlement. “It may be argued that the *causa causans* is not the same. The *causa causans* of the first is the excavation; the *causa causans* of the second is, as a matter of fact, the excavation unremedied, or the combination of the excavation and of its remaining unremedied.”² In the case cited there was a subsidence occasioned by the working of a mine and an injury in 1868 in respect of which compensation was given. But there was a liability to further disturbance, and the defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any further injury. A fresh subsidence took place in 1882, causing further injury, and the court held that the cause of action in respect to this further subsidence did not arise until the subsidence occurred, and that an action could be maintained for the injury caused, although more than six years had passed since the last working of the mine. In the House of Lords, Lord Halsbury said: “Under these circumstances, the question is whether the satisfaction for the past subsidence must be taken to have been equivalent to a satisfaction for all succeeding subsidences. No one

¹ *Bonomi v. Backhouse*, E. B. & E. R., affirmed in *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127, 151; 622, 657, per Willes, J.

² *Mitchell v. Darley Main Colliery* *Crumbie v. Wallsend Local Board Co.*, 14 Q. B. D. 125, 134, per Brett. M. [1891], 1 Q. B. 503.

will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and forever. * * * But the words 'cause of action' are somewhat ambiguously used in reasoning upon this subject; what the plaintiff has a right to complain of in a court of law in this case is the damage to his land, and by the damage I mean the damage which had in fact occurred, and if this is all that a plaintiff can complain of, I do not see why he may not recover, — *toties quoties*, fresh damage is inflicted. Since the decision of this House in *Bonomi v. Backhouse*,¹ it is clear that no action would lie for the excavation. It is not, therefore, a cause of action; that case established that it is the damage, and not the excavation, which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered. I cannot concur in the view that there is a breach of duty in the original excavation."²

¹ 9 H. L. C. 503.

² *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127, 132, 133, overruling *Lamb v. Walker*, 3 Q. B. D. 389, and *Nicklin v. Williams*, 10 Exch. 259.

In estimating the damages no sum should be allowed for damages to arise in future. *Snarr v. Granite Curling & Skating Co.*, 1 Ont. 102; *Whitehouse v. Fellowes*, 10 C. B. N. S. 765.

No damages subsequent to the date of the writ can be taken into account in an action for damages; but if an injunction is applied for and damages are given in substitution for or in addition to an injunction, they may be assessed down to the date of assessment.

There is some authority, however, for holding that all damages which are the direct and natural result of an act of trespass to realty may be discovered in one action, though a part has accrued since the beginning of the suit. All damages which may be reasonably anticipated as likely to flow from the act done should be embraced in the recovery and cannot be made the sub-

ject of a future action. *Lamb v. Walker*, 3 Q. B. D. 389, Cockburn, C. J., dissenting; *Nicklin v. Williams*, 10 Exch. 259; *Williams v. Missouri Furnace Co.*, 13 Mo. App. 70.

In *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. D. 125, 131 Brett, M. R., says that *Nicklin v. Williams*, *supra*, is not good law, and that the logical conclusion from *Bonomi v. Backhouse*, E. B. & E. 622, 9 H. L. Cas. 503, also shows that decision to be wrong. The decision in *Lamb v. Walker*, *supra*, is also overruled. "The principal reason which has caused the courts to hesitate in the adoption of the rule is the danger that it would lead the jury into the dominion of speculative damages; but this reason is overborn by the policy of preventing a multiplicity of suits, by requiring all damages, present and prospective, springing out of a wrongful act done, to be sued for and recovered in one suit." *Williams v. Missouri Furnace Co.*, 13 Mo. App. 70, 75, per Thompson, J.

629. A right to lateral or subjacent support will be protected by injunction if an irreparable injury is threatened, although the damages would be slight and might be compensated for in money.¹ The court will interfere by injunction to prevent a threatened injury to a landowner through the removal of the support to his land, though no damage has actually occurred, when the threatened act will invariably result in irreparable damages. Jessell, M. R., in an action against defendants who were working coal under the plaintiff's land, said: "If they were doing an act which it could be proved to me by satisfactory expert evidence would necessarily have that effect (of letting down the plaintiff's land), I have no doubt this court would interfere by injunction on the ground upon which it always interferes, namely, to prevent irreparable damage when the damage is only threatened. Of course, they must have a much clearer and much stronger case to call for the interference of this court by injunction where the damage is merely threatened and no damage has actually occurred than when some damage has actually occurred, because in the one case you have no facts to go by, but only opinion, and in the other case you have actual facts to go by. If some damage has occurred, it makes it manifest and certain that further damage will occur by reason of the prosecution of the works."²

630. A court of equity will not enjoin a landowner from making excavations on his land, when no serious injury to the adjoining realty is imminent and when there is nothing peculiar in the situation and circumstances of such realty. The injury in such case would ordinarily be so slight that the remedy at law is entirely adequate. Moreover, it is only by experiment that it can be known how far the excavation can be safely carried, and an interference

¹ High on Injunctions, § 538; 2 Story's Eq. Jur., § 929; Hunt v. Peake, Johns. Ch. (Eng.) 705; McMaugh v. Burke, 12 R. I. 499; Farrand v. Marshall, 19 Barb. 380, 21 Barb. 409; Trowbridge v. True, 52 Conn. 190, 200, 52 Am. Rep. 579. "In this case the defendant was not enjoined absolutely against digging on his own land in such a way as to endanger the plaintiff's soil, which might have debarred him from a rightful use of the soil on his

own land, but only from digging beyond a certain depth and slope, unless he provided a sufficient artificial support for the plaintiff's land in the place of the soil removed. This was imposing no serious burden upon the defendant, and we think the injunction, so limited and qualified, was properly granted." Per Carpenter, J.

² Birmingham v. Allen, 6 Ch. D. 284, 287.

by injunction might be doing a detriment to one party in order to afford an unnecessary protection to the other.¹ Though there is a building on the adjoining land, an injunction will not be granted restraining excavations on the claim that they cannot be made without endangering the building. The landowner has a right to excavate his own land for reasonable improvements, and a court of equity will not stop the work if it is prosecuted with reasonable care and skill.²

An injunction will not be granted to restrain a landowner from placing the foundations of his building upon such a level that the adjoining owner cannot rebuild his foundations without removing the lateral support of the building about to be erected. If, as a result of a lawful excavation by the adjoining owner, the defendant's building should fall or slide upon his land, the plaintiff might be liable in damages; but that is a matter to be considered when it occurs. "If the defendant keeps his building and its foundation within the bounds of his own land, he has the legal right to erect them as near the line between his land and that of the orators, and as high above and as deep below the surface of the soil as he sees fit to do. While the wisdom of the act might be questionable by erecting them on the line, he would be in the exercise of such legal right, and would violate no legal right of the orators."³

631. The form of the injunction in such cases is merely the enjoining of the defendant from constructing his work in such a manner as to occasion any damage or destruction to the property of the plaintiff. The injunction is against working in any way that shall result in disaster to the plaintiff, and does not forbid working in any particular way.⁴

¹ *McMaugh v. Burke*, 12 R. I. 499. per Thompson, J., citing *Hubbard v. See Wier & Bell's App.* 81* Pa. St. Town, 33 Vt. 295.

203. ⁴ *Elliot v. North Eastern Ry. Co.*, 10 H. L. Cas. 333, 2 D. F. & J. 423; *Mundy v. Duke of Rutland*, 23 Ch. D. 81, 85;

² *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524.

³ *Graves v. Mattison*, 67 Vt. 630, 636, Hext v. Gill, L. R. 7 Ch. 699, 718; *Wier v. Bell's App.* 81* 203.

CHAPTER XV.

PARTY-WALLS.

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| <p>I. Definition and statutory provisions, 632-640.</p> <p>II. Party-wall agreements, express and implied, 641-662.</p> <p>III. Using a party-wall, 663-667.</p> <p>IV. Whether the agreement runs with the land, 668-686.</p> | <p>V. Windows and other openings in, 687-695.</p> <p>VI. Right to build higher, 696-705.</p> <p>VII. Removing and rebuilding, 706-724.</p> |
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I. Definition and Statutory Provisions.

632. A party-wall is a dividing wall between two houses to be used as an exterior wall for each.¹ “The central idea, the true, comprehensive, and undivided meaning of the term ‘party-wall,’” where used in an agreement between the owners of adjoining lots of land, providing that one may build a party-wall resting one-half on each lot, and that the other shall have the right to use it on paying one-half its value, is that of mutuality of benefit, and excludes the idea of any exclusive use of the wall.² Mr. Justice Fry, speaking of the meaning of the words “party-wall,” said:³ “The words appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford*,⁴ and *Corbitt v. Porter*.⁵ I think that the judgments in those cases show that that is the most common and the primary meaning of the term. In the next place

¹ *Weston v. Arnold*, L. R. 8 Ch. 1804, 1089; *Harber v. Evans*, 101 Mo. 661, 14 S. W. Rep. 750, 10 L. R. A. 41; *Glover v. Mersman*, 4 Mo. App. 90; *Fettretch v. Leamy*, 9 Bosw. 510; *Field v. Leiter*, 118 Ill. 17, 6 N. E. Rep. 877; *Odd Fellows Hall Asso. v. Hegele*, 24 Oreg. 16, 32 Pac. Rep. 679; *Brown v. Werner*, 40 Md. 15; *Moore v. Shoemaker* (D. C.), 25 Wash. L. Rep. 72, 29 Chic. L. N. 207.

² *Harber v. Evans*, 101 Mo. 661, 14 S. W. Rep. 750, per Sherwood, J. And see *Fidelity Lodge v. Bond* (Ind.), 45 N. E. Rep. 338; *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287; *Graves v. Smith*, 87 Ala. 450, 6 So. Rep. 308; *Everett v. Edwards*, 149 Mass. 588, 22 N. E. Rep. 52.

³ *Watson v. Gray*, 14 Ch. D. 192, 194.

⁴ 1 Man. & Ry. 404.

⁵ 8 B. & C. 257, 265.

the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring owners, as in *Matts v. Hawkins*.¹ Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the building acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favor of the owner of the other moiety." This last is the sense in which the term is more frequently used in the United States.

633. If the buildings separated by a wall are not of the same height, the wall may not be a party-wall from the top to the bottom of it. "A wall may be a party-wall up to part of its height, and may be an external wall for the rest of its height. We have known in this court cases in which property in London is intermixed in such a way that one man's basement and cellar extend under another man's shop; and again, the first floor of one house is over the shop of the next house. In such a case there would be a party-wall between the two buildings below, which above would be only a private partition between two rooms in the same house. There is nothing in fact or in law to make it impossible or improbable that a wall should be a party-wall up to a certain height, and above that height be the separate property of one of the owners."²

634. In several States there are statutes regulating the right of adjoining owners in party-walls, and in several cities there are ordinances regulating these rights under statutory authority. It has been questioned whether there can be a valid law or ordinance authorizing one owner of land to build a wall partly on his neighbor's land to be used as a party-wall because such legislation or ordinance would provide for the taking of private property for private use. In the absence of express constitutional authority such legislation would seem to be beyond the law-making power. In a recent case in New Jersey the vice-chancellor said: "It seems to me that where my neighbor takes exclusive possession and occupation of my land by covering it with a solid wall of masonry many feet high, he

¹ 5 Taunt. 20.Pursell, 11 Ch. D. 412; *Musgrave v.*² *Weston v. Arnold*, L. R. 8 Ch. Sherwood, 54 How. Pr. 338.1084, 1090, per James, L. J.; *Knight v.*

'takes' it from me in the most thorough and effective manner, although the legal title remains in me. I do not understand that the legal title is at all involved in an unlawful 'taking' of land, but that it is a question rather of practical dominion over, and the right to use it at the owner's free will and pleasure, so that he do not injure his neighbor or the public. When and so far as the owner is prevented from exercising such dominion over his land, it is 'taken' from him. Nor do I understand such taking can be authorized by any supposed benefit to result to the owner. Especially is this true in the case of a party-wall, where the realization of the supposed benefit depends entirely upon the manner in which the owner to be benefited may desire to enjoy his lot. If he shall never desire to build on that part of his lot, a party-wall will never be of any benefit to him; or even if he shall desire to build up to his line, the party-wall may be entirely unsuited in thickness and material for the structure he proposes to erect, and so be a positive injury rather than a benefit to him."¹

635. District of Columbia: It is a condition annexed to the title of every house-lot in the city of Washington, that when the proprietor builds a partition-wall between himself and his neighbor, he shall lay the foundation equally upon the lands of both; and that any person who shall afterwards use the partition-wall, or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use.²

636. Iowa:³ In cities, towns, and other places surveyed into building lots, the plats whereof are recorded, he who is about to build contiguous to the land of his neighbor may, if there be no wall on the line between them, build a brick or stone wall at least as high as the first story, if the whole thickness of such wall above the cellar wall does not exceed eighteen inches, exclusive of the plastering, and rest the one half of the same on his neighbor's land; but the latter shall not be compelled to contribute to the expense of

¹ *Traute v. White*, 46 N. J. Eq. 437, 440, 19 Atl. Rep. 196, per Pitney, V. C. A dictum to the contrary in *Hunt v. Ambruster*, 17 N. J. Eq. 208, is questioned.

² *Miller v. Elliot*, 5 Cranch, C. C. 543. The trust deed of the original proprietors of the lands now compris-

ing the city provided for building regulations, and the president of the United States on the 17th of October, 1791, declared certain regulations. The charter of the city in 1820, confers the power to regulate party-walls. Act of Congress, June 14, 1878.

³ Annot. Code, 1888, §§ 3194-3205.

said wall. If his neighbor be willing, and does contribute one-half of the expense of building such wall, then it is a wall in common between them; and if he even refuses to contribute to the building of such wall, he shall yet retain the right of making it a wall in common by paying to the person who built one-half of the appraised value of said wall at the time of using it. Every wall being a separation between buildings shall, as high as the upper part of the first story, be presumed to be a wall in common, if there be no title, proof, or mark to the contrary. The repairs and rebuilding of walls in common are to be made at the expense of all who have a right to the same and in proportion to the interest of each therein; nevertheless, every co-proprietor of a wall in common may be exonerated from contributing to the repairs on building by giving up his right in common if no building belonging to him be actually supported by the wall thus held in common.

Every co-proprietor may build against a wall held in common, and cause beams or joists to be placed therein, and any person building such a wall shall, on being requested by his co-proprietor, make the necessary flues and leave the necessary bearings for the joists or beams at such height and distance apart as shall be specified by his co-proprietor.

Every co-proprietor is at liberty to increase the height of the wall in common; but he alone is to be at the expense of raising it, and of repairing and keeping in repair that part of the wall above the part so held in common. If the wall so held in common cannot support the wall to be raised upon it, he who wishes to have it made higher is bound to rebuild it anew entirely and at his own expense, and the additional thickness of the wall must be placed entirely on his own land. The person who did not contribute to the heightening of the wall held in common may cause the raised part to become common by paying one-half of the appraised value of such raising and half of the value of the grounds occupied by the additional thickness of the wall, if any ground was so occupied.

Every proprietor joining a wall has, in like manner, the right of making it a wall in common, in whole or in part, by repaying to the owner of the wall one-half of its value, or the one-half of the part which he wishes to hold in common, and one-half of the value of the ground on which it is built, if the person who has built the wall has laid the foundation entirely upon his own ground.

Neither of the two neighbors can make any cavity within the

body of the wall held by them in common; nor can either affix to it any work without the consent of the other, or without having, on his refusal, caused the necessary precautions to be used so that the next work be not an injury to the rights of the other, to be ascertained by persons skilled in building.

No dispute between neighbors as to the amount to be paid by one or the other, by reason of any of the matters treated of in this chapter, shall delay the execution of the provisions of the same, if the party on whom the claim is made shall enter into bonds, with security, to the satisfaction of the clerk of the district court of the proper county, conditioned that he shall pay to the claimant whatever may be found to be his due on the settlement of the matter between them, either in a court of justice or elsewhere.

These provisions do not prevent adjoining proprietors from entering into special agreement about walls on the lines between them; but no evidence of such agreement shall be competent unless it be in writing, signed by the parties thereto, or their lawfully authorized agents, and whenever such proprietor is a minor, the guardian of his estate shall have full authority to act in all matters relating to walls in common.¹

637. Louisiana:² The Civil Code provides that the owner of land in cities and towns may build one half of his wall on the vacant land of his neighbor, provided the wall is of brick or stone and does

¹ This statute is modeled upon the statute of Louisiana. See decisions under that statute. Statute declaratory of the common law. *Zugenbuhler v. Gilliam*, 3 Iowa, 391. As to presumption when half of wall rests on vacant lot, *Bertram v. Curtis*, 31 Iowa, 46. As to agreements between the parties in harmony with the statute, see *Freeman v. Herwig*, 84 Iowa, 435, 51 N. W. Rep. 169. In the first section of the statute the phrase "if there be no wall on the line," refers not merely to the actual wall of a building, but to any part of a building; and the statute does not authorize the erection of such a wall where the wall, if erected, will destroy a stairway on the adjoining land. *Cornell v. Bickley*, 85 Iowa,

219, 52 N. W. Rep. 192. As to oral agreements, see *Price v. Lien*, 84 Iowa, 590, 51 N. W. Rep. 52. As to presumptions of ownership, see *Bertram v. Curtis*, 31 Iowa, 46. As to the authority to build a party-wall where such a wall will interfere with the maintenance of an outside stairway to the building on the adjoining land, see *Cornell v. Bickley*, 85 Iowa, 219, 52 N. W. Rep. 192.

But this statute does not authorize the building and maintenance of a stone wall, half on the lot of a neighbor, by one who simply "intends" to build a brick superstructure thereon. He must be "about" to build. *Switzer v. Davis* (Iowa), 66 N. W. Rep. 174.

² R. Civ. Code 1889, arts. 675, 685.

not exceed eighteen inches in thickness. The wall becomes a wall in common between the proprietors if his neighbor is willing to contribute his half of the expense of building the wall. Each proprietor is at liberty to increase the height of the wall held in common, but the proprietor who raises the wall is alone to be at the expense of raising it and of keeping it in repair. If the wall held in common cannot support the additional weight, he who wishes to have it made higher is bound to rebuild it anew entirely, at his own expense, and the additional thickness must be taken from his property. The neighbor who did not contribute to the raising of the wall held in common may cause the raised part to become common by paying one half the expense of such raising and the value of the half of the soil employed for the additional thickness, if there is any. Every proprietor adjoining a wall has, in like manner, the right of making it a wall in common, in whole or in part, by reimbursing to the owner of the wall one-half of its value or the half of the part which he wishes to hold in common and one-half of the value of the soil upon which the wall is built, if the person who has built the wall has laid the foundation entirely upon his own estate.¹

638. Mississippi:² Any agreement for erecting walls which parties may make who own adjoining lots and desire to build party-walls, shall be binding whether in writing or not; and in case of the failure of either party to comply with his contract, the other may have an action for damages.

If the owner of any lot shall build a substantial and durable brick or stone wall on the line which divides his lot from another, and the owner or lessee of that other should desire to erect an adjoining building and connect the same with the building already erected, so as to make the wall of the former building serve as the wall of his own, he may do so by paying to the owner of the first wall half the value thereof or half the value of so much of the former wall as he may use as a wall to his own house; but he shall not be at liberty to use the former wall in any way which may prove dangerous or detrimental to the owner, except he may close lights therein.

¹ See decisions under this statute. *owner is not required. Heine v. Mer-*
Costa v. Whitehead, 20 La. Ann. 341; *rick*, 41 La. Ann. 194, 5 So. Rep. 760;
Auch v. Labouisse, 20 La. Ann. 553. *Oldstein v. Firemen's Build. Asso.*, 44

The right given by the Code to build La. Ann. 492, 10 So. Rep. 928.

the party-wall higher is an absolute ² Annot. Code 1892, §§ 3138-3142.

right, and the consent of the other

A person shall not be at liberty to join or use a wall as a party-wall without first paying to the owner thereof one-half the value of so much as may be used; and if the parties cannot agree as to the value, either may apply to the mayor, police-justice of the city, town or village, or to any justice of the peace of the county, in writing, for the appointment of suitable persons to assess the amount to be paid. Any party-wall which has been paid for, and is used as such, shall not be removed by either party without the consent of the other; nor shall it be so damaged or altered as to render it less valuable to either. And if either party violate this provision, he shall be liable to the other as a trespasser for all damages that may be sustained.

639. Pennsylvania:¹ The rights and duties of the owners of adjoining lots with reference to party-walls are defined by the statute of 1721 in the absence of an agreement between the parties. This statute was applicable to Philadelphia only. It conferred upon the surveyors and regulators power and authority to set out

¹ Brightley's Purdon's Dig. 1894, p. 1458, §§ 340-349. Before the Act of April 10, 1849, the claim for the use of a party-wall did not pass from the first owner by his conveyance. *Dannaker v. Riley*, 14 Pa. St. 435; *Knight v. Beenken*, 30 Pa. St. 372. By that statute it was provided that in all conveyances of houses and buildings, the right to and compensation for the party-wall built therewith, shall be taken to have passed to the purchaser, unless otherwise expressed, and the owner of the house for the time being, shall have all the remedies in respect to such party-wall as he might have in relation to the house to which it is attached.

See also Statutes May 7, 1855, P. L., p. 466, and May 20, 1857, P. L., p. 590, and decisions interpreting the statutes. *Deringer v. Augusta Hotel Co.*, 155 Pa. St. 609, 26 Atl. Rep. 769; *Dauids v. Harris*, 9 Pa. St. 501; *Hoffstot v. Voight*, 146 Pa. St. 632, 23 Atl. Rep. 351; *Western Nat. Bank's App.*, 102 Pa. St. 171; *Ingles v. Bringham*, 1 Dall. 341; *Knight v. Beenken*, 30 Pa. St.

372; *Haines v. Drips*, 2 Parson's Sel. Cas. 236; *Mayer's App.*, 73 Pa. St. 164.

A builder, who, without a permit from the building inspectors, erects a party-wall of greater thickness than is required by the height and character of the building, cannot place one half of it on the adjoining lot, although the encroachment is within the maximum limit fixed by law. The extent of the use of the adjoining land is within the discretion of the inspectors, and is to be determined by the character and size of the building to be erected. *Kirby v. Fitzpatrick*, 168 Pa. St. 434.

A court of equity will not, by injunction, compel the removal of a defectively constructed party-wall. *Mulligan v. Fitzpatrick*, 10 Pa. Co. Ct. 179. One is not liable in trespass for removing and rebuilding a condemned wall. *McVey v. Durkin*, 136 Pa. St. 418, 20 Atl. Rep. 541, 26 W. N. Cas. 522. The instructors are judges of the sufficiency of the wall. *Childs v. Napheys*, 112 Pa. St. 504, 4 Atl. Rep. 488. As to extension of party-wall already built, see *Duncan v. Hanbest*, 2 Brews. 362.

the foundations and regulate the thickness of party-walls one-half of which should be placed upon the land of each person between whom such wall should be made. The duties of such officers under subsequent statutes are performed by the building inspectors. The first builder is to be reimbursed one moiety of the charge of such party-wall, or for so much thereof as the next builder should have occasion to use.

640. South Carolina:¹ Every person who shall erect in a city or town any building with brick shall have liberty to set half his partition-wall in his next neighbor's ground, provided he leave a toothing in the corner of such wall for his neighbor to adjoin unto. When the owner of such adjoining land shall build, he shall pay for one half of the said partition-wall so far as he makes use of the same.

II. *Party-wall Agreements, Express and Implied.*

641. A party-wall agreement in the usual form between the owners of adjoining lots creates an easement in each of them.² Such agreement provides for building such wall one-half of its thickness on the land of each; with a covenant that whenever the party by whom the wall was not constructed shall use it, or any part of it, he shall pay to the other one half of the value of the wall so used. Such agreement with the covenant connected with it is a charge upon the land.

The agreement usually in terms binds the parties and their heirs and assignors; and it is sometimes in terms declared to run with the land.

A party-wall agreement is ordinarily made between the owners or purchasers in fee of adjoining estates. Only such owners can make an effectual agreement. A division wall erected by tenants for years may be a party-wall as between themselves, but it creates no easement binding on the owner of the reversion in fee that would prevent him, after the expiration of the term, from dealing with his property as if no such wall had been erected.³

Aside from an agreement, express or implied, creating a party-wall, this can exist only by force of statutory provisions or by prescription. The common law does not create such a thing.⁴

¹ R. S. Civ. Law 1893, §§ 1966, 1967.

³ Webster v. Stevens, 5 Duer, 553.

² Keteltas v. Penfold, 4 E. D. Smith, 122; Gibson v. Holden, 115 Ill. 199, 3 N. E. Rep. 282.

⁴ List v. Hornbrook, 2 W. Va. 340, 345; Whiting v. Gaylord, 66 Conn. 337, 34 Atl. Rep. 85; Quinn v. Morse, 130

If the agreement is executed under seal, the mutual covenants of the parties furnish an ample consideration for the undertakings of each party, and it does not matter how small his interest in the land may be.¹

One who has, by deed or agreement, given to the adjoining owner the right to use a wall between their buildings as a party-wall cannot recover in ejectment against him or his assigns the land occupied by the wall.²

642. A parol agreement fully executed under which a party-wall has been built, one-half on the land of each owner of adjacent lots of land, creates an easement which attaches to and runs with the land, and cannot be revoked.³ But a parol agreement relating to a party-wall before it is executed is void under the statute of frauds, which requires all agreements relating to any interest in land to be in writing.⁴ A parol agreement, before it is executed, amounts to a license merely, which may be revoked; and a sale before the building of the wall has been commenced amounts to a revocation.⁵

If one builds a party-wall on the division line between his land and that of his neighbor, who verbally agrees to pay one-half of the expense of its construction, and afterwards uses the wall, the builder of the wall may recover one-half of such expense, although it appears that the wall was not constructed upon the exact division line.⁶ In an action to recover half the cost of such wall, it is competent to show that the defendant was present when the division line was designated by the city engineer, and made no objection to the construction of the foundation and wall while work was going

Mass. 317; *Gilmore v. Driscoll*, 122 Mass. 199, 207, 23 Am. Rep. 312; *Bonomi v. Backhouse*, El. B. & El. 622, 9 H. L. Cas. 503.

¹ *Scott v. McMillan*, 4 N. Y. Supp. 434, 8 Daly, 320.

² *Brondage v. Warner*, 2 Hill, 145.

³ *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475; *Wickersham v. Orr*, 9 Iowa, 253, 74 Am. Dec. 348; *Rawson v. Bell*, 46 Ga. 19; *Rice v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195; *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. Rep. 753; *Huck v. Flentye*, 80 Ill. 258;

Eckleman v. Miller, 57 Ind. 88; *Burton v. Moffitt*, 3 Oreg. 29; *Miller v. Brown*, 33 Ohio St. 547.

⁴ *May v. Prendergast*, 12 Pa. Co. Ct. 220; *McLarney v. Pettigrew*, 3 E. D. Smith, 111.

⁵ *Rice v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195; *Hodgkins v. Farrington*, 150 Mass. 19, 22 N. E. Rep. 73, 5 L. R. A. 209.

⁶ *Zeininger v. Schnitzler*, 48 Kan. 63, 28 Pac. Rep. 1007. And see *Bank of Escondido v. Thomas*, (Cal.) 41 Pac. Rep. 462.

on, and also that he agreed to pay one half of the expenses of such foundation and wall when he should use the same.¹

Where adjoining proprietors entered into a parol agreement to jointly build a party-wall, one-half on the premises of each, and accordingly built a portion of the wall, but one of them refused to proceed, the other having planned his building in reliance on the contract being performed, was held not to be confined to his remedy for specific performance, but might go on and complete the wall, and in an equitable action recover of the other proprietor one-half of the expense.²

The wall in such case would belong to the builder until paid for by the other party, who might be enjoined from using it or breaking into it.³

Where one has verbally consented to the use of a wall of his building as a party-wall by the owner of the adjoining land, and the latter has used the wall relying upon such consent, the owner of the wall is estopped by such consent to enjoin such other party from using the wall as a party-wall. If the owner of the wall has any remedy under the circumstances of the consent given, it is an action to recover a proportionate part of the cost of the wall.⁴

Where one agreed in writing that the owner of an adjoining lot might use the wall of his warehouse as a party-wall for a consideration named, to be paid when it should be found that the wall was safe and a proper conveyance had been executed, and such owner, after the wall was found to be safe and a tender of the consideration had been made, refused to make a conveyance, it was held that he was not entitled to an injunction to restrain his neighbor from using the wall as agreed, but was entitled to recover any damages he might suffer.⁵

643. One who inserts the timbers of his building in a wall on the land of an adjoining owner, with his oral permission is a mere licensee; and a successor in title of the owner of the wall, upon discovering the encroachment within twenty years from the giving of such license, is entitled, upon a bill in equity for the removal of such timbers, to a decree authorizing him to remove the timbers at

¹ Zeininger v. Schnitzler, 48 Kan. 66, 29 Pac. Rep. 694.

² Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 475.

³ Masson's App., 70 Pa. St. 26.

⁴ Bank of Escondido v. Thomas, (Cal.) 41 Pac. Rep. 462. Not to be officially reported.

⁵ Poultney v. Depkin, (Md.) 30 Atl. Rep. 705. Not to be reported.

his own expense, and to an injunction, unless the owner of the building makes the removal within a brief time named, forbidding any interference with his so doing. Such relief will not be refused on the ground that the plaintiff has been guilty of laches, or that he declines to sell a strip of land under the wall or to grant an easement therein. The removal should be made at the expense of the owner of the wall, inasmuch as the encroachment became unlawful only upon the countermanding of the license.¹

644. In the absence of evidence to the contrary a common wall between two adjoining estates is presumptively a party-wall, either from an agreement to that effect or from its being built upon the line of such estates for that purpose by the respective owners.² Of course, this presumption may be rebutted by evidence that the whole wall belongs to the owner of one estate, or by evidence that the owner of the two estates owns half of the wall in separate ownership, subject to no easement in favor of the other.³

It must be shown that the use was adverse, open and visible, and such as to give a right of action in favor of the party against whom the right has been exercised. Where the owner of one part of a double house claimed an easement by prescription to rest the timbers of his house upon the division wall, it appeared that the owners of both parts of the house derived title from a common grantor. Of course, while the house was owned by the common grantor, no easement in favor of one part as against the other could arise; and no sufficient time having elapsed since the severance of the estate to create a prescription, the title to an easement of support could depend only upon a grant express or implied.⁴

645. A division wall between buildings becomes a party-wall by prescription after continuous use as such for twenty years or such other length of time as is necessary to establish a prescriptive right by statute.⁵ After the easement has been perfected

¹ Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. Rep. 73, 5 L. R. A. 209.

² Cubitt v. Porter, 8 B. & C. 257
Matts v. Hawkins, 5 Taunt. 20; Watson v. Gray, 14 Ch. D. 192; Schile v. Brokhahus, 80 N. Y. 614; Campbell v. Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570; Weyman v. Ringold, 1 Bradf. 40, 61; Weill v. Baker, 39 La. Ann. 1102,

3 So. Rep. 361; Warner v. Southworth, 6 Conn. 471.

³ Murly v. McDermott, 8 Ad. & E. 138; Matts v. Hawkins, 5 Taunt. 20.

⁴ Whiting v. Gaylord, 66 Conn. 337, 34 Atl. Rep. 85.

⁵ McVey v. Durkin, 136 Pa. St. 418, 20 Atl. Rep. 541, 26 W. N. C. 522; Western Nat. Bank's App., 102 Pa. St.

by prescription, neither party can remove the wall or so deal with it as to render it an insufficient support for the other's building, without his consent.¹ To establish a right by prescription the burden of proof is on the party seeking to establish the right.²

By prescription an easement obtained by an adjoining owner for the support of his building on his neighbor's wall becomes appurtenant to his estate, and passes to his grantee, even without special mention or the use of the word "appurtenances."³

646. The easement in a common wall between two buildings implied from the use of it as a party-wall, is restricted to the buildings existing at the time the easement was created, and when such buildings are destroyed the easement terminates. If one of the adjoining owners rebuilds the wall, one-half the thickness of it on the land of his neighbor, the latter may recover the portion of the land on which the wall stands.⁴ Thus, where an original party-wall between buildings five stories high was twelve inches in thickness, the party rebuilding after their destruction by fire built a party-wall of the same thickness for a two-story building. The law in force required for a five-story building more than fifty feet in height, which the adjoining owner wished to build, a wall sixteen inches thick. The latter is thus compelled, in order to use the party-wall, to build a house on his property less than fifty feet high, or in effect to surrender to his neighbor some inches of his land. "It is clear," said Judge Ingraham, "that it was never intended by the parties, when the party-wall was established, that the rights thus granted should produce that result. The requirements of a large and constantly changing city are such that restrictions in the use of property should be limited, rather than extended, by impli-

171; *Hodgkins v. Farrington*, 150 Mass. 19, 22 N. E. Rep. 73, 5 L. R. A. 209; *McLaughlin v. Ceconi*, 141 Mass. 252, 5 N. E. Rep. 261; *Graves v. Smith*, 87 Ala. 450, 6 So. Rep. 308, 5 L. R. A. 298; *Brown v. Werner*, 40 Md. 15; *Dowling v. Hennings*, 20 Md. 179, 83 Am. Dec. 545; *Barry v. Edlavitch* (Md.), 35 Atl. Rep. 170; *O'Daniel v. Baker's Union*, 4 Houst. 488; *Schile v. Brokhahus*, 80 N. Y. 614; *Webster v. Stevens*, 5 Duer, 553; *Kelly v. Taylor*, 43 La. Ann. 1157, 10 So. Rep. 255.

See, however, *Hieatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280.

¹ *Eno v. Del Vecchio*, 4 Duer, 53, 6 Duer, 17.

² *Moore v. Raynor*, 58 Md. 411.

³ *Barry v. Edlavitch* (Md.), 35 Atl. Rep. 170, citing *Ritger v. Parker*, 8 Cush. 145, 54 Am. Dec. 744; *Barnes v. Lloyd*, 112 Mass. 224; *Coolidge v. Hager*, 43 Vt. 9, 5 Am. Rep. 256; *Wetherell v. Brobst*, 23 Iowa, 586.

⁴ *Heartt v. Kruger*, 25 N. Y. St. 686, 691, 5 N. Y. Supp. 192, affirmed 121 N. Y. 386, 24 N. E. Rep. 841.

cation, and full effect can be given to the implied covenant creating the easement by restricting it to the building on the property at the time the easement was created."¹

647. There is no implied contract on the part of the owner of land upon which another has built half the thickness of a party-wall to pay anything for the use of it. In the absence of an express agreement, or of a statutory provision, such owner has the right to use so much of the party-wall as stands upon his own land without paying anything for such use.² The mere building of a wall by one of two adjacent owners, and placing the same in equal proportions on each lot, does not make it a party-wall in absence of agreement to that effect.³

It has been asserted, however, contrary to nearly all the authorities, that as a common-law right, the owner of one of two adjoining lots of vacant land may build a partition-wall one-half on his neighbor's land, and if that neighbor subsequently uses the wall he makes it a party-wall and becomes liable to pay for his share.⁴ It is true that such a right may arise by prescription, but aside from this, it can exist only by force of statute or by contract express or implied.⁵

648. If a division wall is built without any contract between the parties and there is no statute regulating the rights of the parties,

¹ *Heartt v. Kruger*, 25 N. Y. St. 686, 5 N. Y. Supp. 192. See, also, *McLaughlin v. Cecconi*, 141 Mass. 254, 5 N. E. Rep. 262; *Putzel v. Drover's & Mech. Nat. Bank*, 78 Md. 349, 360, 28 Atl. Rep. 276; *Barry v. Edlavitch (Md.)*, 35 Atl. Rep. 170; *Brooks v. Curtis*, 4 Lans. 283, 50 N. Y. 639, 10 Am. Rep. 545; *Crapo v. Cameron*, 61 Iowa, 447, 16 N. W. Rep. 523.

² *Allen v. Evans*, 161 Mass. 485, 37 N. E. Rep. 571; *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *Koenig v. Haddix*, 21 Ill. App. 53; *McCord v. Herrick*, 18 Ill. App. 423; *Giess v. Schadt*, 14 Pa. Co. Ct. 177, 3 Lack Jur. 217; *Finley v. Stuebing*, 38 Leg. Int. 386; *Oat v. Middleton*, 2 Miles, 247; *Preiss v. Parker*, 67 Ala. 500; *Antomarchi v. Russell*, 63 Ala. 356, 35 Am. Rep. 40; *Bisquay v. Jeune-*

lot, 9 Ala. 245, 44 Am. Dec. 483; *Brown v. McKee*, 57 N. Y. 684; *Sherred v. Cisco*, 4 Sandf. 480; *Potter v. White*, 6 Bosw. 644; *Warner v. Rogers*, 23 Minn. 34; *Orman v. Day*, 5 Fla. 385; *Wilkins v. Jewett*, 139 Mass. 29, 29 N. E. Rep. 214, holding that the provincial statute of 1683-4, Prov. St. 1692-3, providing that any one building on his own land in Boston might set half his partition wall on his neighbor's land, and that the neighbor, when he should build, should pay for half of so much of the wall as he should build against, has never been in force in the commonwealth. Dictum to contrary, in *Quinn v. Morse*, 130 Mass. 317.

³ *Oldstein v. Firemen's Build. Asso.*, 44 La. Ann. 492, 10 So. Rep. 928.

⁴ *Zugenbuhler v. Gilliam*, 3 Iowa, 391.

⁵ *List v. Hornbrook*, 2 W. Va. 340.

the party who built the wall cannot recover of the adjoining owner any part of the cost of building it. The assent of the adjoining owner, express or implied, in the absence of proof of an express contract to pay, cannot be stretched into an implied contract to pay.¹

If one builds a party-wall, partly on his own land and partly on the land of his neighbor, with the expectation that his neighbor will pay part of the cost of it, and the latter had reason to know that he was acting with that expectation and allowed him so to act without objection, the jury may, in the absence of an express agreement as to payment, infer a promise to pay.²

If, however, there was a parol agreement or an understanding from which the jury might find an agreement, to pay the value of one half of the wall whenever it should be used, this agreement may be enforced either against the party to the agreement who makes use of the wall, or his grantee with notice of it, if he first makes use of the wall.³

649. If one erects or owns two buildings with a common wall between them and sells one of them, with the land upon which it stands, describing the division line as running through the center of such wall, or by course and distance, or by designation of the building, to the same effect, it thereupon becomes a party-wall. Although the land covered by the wall is the several property of the owners of each half, yet the title of each is qualified by the easement to which the other is entitled.⁴ It is the actual existence of

¹ List v. Hornbrook, 2 W. Va. 340.

² Day v. Caton, 119 Mass. 513, 516, 20 Am. Rep. 347, Devens, J., said: "If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But, if the fact was merely brought to his attention upon a single occasion, and casually, if he had little opportunity to notify the other that he did not desire the work, and should not pay

for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract."

³ Wickersham v. Orr, 9 Iowa, 253, 74 Am. Dec. 348. And see Sanders v. Martin, 2 Lea, 213, 31 Am. Rep. 598; Platt v. Eggleston, 20 Ohio St. 414; Bank of Escondido v. Thomas (Cal.), 41 Pac. Rep. 462.

⁴ Richards v. Rose, 9 Exch. 218; Solomon v. Vintner's Co., 4 H. & N.

the wall as a part of both houses, and not the reference to it as a monument, from which the grant and reservation are implied. As regards the wall, it is immaterial whether the buildings are conveyed under the description of the lots or by designation as buildings.¹

The purchaser in such case is presumed to have contracted with reference to the condition of the property at the time, and to take it with all the benefits and burdens which apparently belong to it.²

If the purchaser buys a vacant lot on which his grantor has erected a portion of a party-wall, he is under no obligation to pay for any part of the cost of the wall when he uses it.³

650. Whether a conveyance of one of two adjoining buildings, owned by the grantor conveys the land on which part of the division wall stands or only an easement in the wall depends upon its terms. Where one owning a brick building constructed an addition to it and used the south wall of such building as the north wall of the addition adjoining, and then conveyed the lot on which the addition stood with "the undivided one-half of the wall on the north side of the above-described premises," it was held that the grantee took only an easement in the wall and not any part of the land on which it stood.⁴ "If the deed had been altogether silent as to the wall, it is probable that an interest in the wall in the nature

586; *Goldschmid v. Starring*, 5 Mack. 582; *Ingals v. Plamondon*, 75 Ill. 118; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Carlton v. Blake*, 152 Mass. 176, 25 N. E. Rep. 83; *Everett v. Edwards*, 149 Mass. 588, 22 N. E. Rep. 52; *Quinn v. Morse*, 130 Mass. 317; *Brooks v. Curtis*, 50 N. Y. 639, 642, 10 Am. Rep. 545; *Heartt v. Kruger*, 121 N. Y. 386, 24 N. E. Rep. 841, 24 J. & S. 382, 25 N. Y. St. Rep. 686, 5 N. Y. Supp. 192; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Eno v. Del Vecchio*, 4 Duer, 53; *Webster v. Stevens*, 5 Duer, 553; *Hieatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280; *Doyle v. Ritter*, 6 Phila. 577; *Beaver v. Nutter*, 10 Phila. 345; *Moore v. Shoemaker* (D. C.), 25 Wash. L. Rep. 72, 29 Chic. L. N. 207.

¹ *Goldschmid v. Starring*, 5 Mack.

582; *Carlton v. Blake*, 152 Mass. 176, 25 N. E. Rep. 83; *Sanborn v. Rice*, 129 Mass. 387; *Warfel v. Knott*, 128 Pa. St. 528, 18 Atl. Rep. 390.

² *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Heartt v. Kruger*, 121 N. Y. 386, 24 N. E. Rep. 841; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Lampman v. Milks*, 21 N. Y. 505, 507. "The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains." Per Selden, J.

³ *Doyle v. Ritter*, 6 Phila. 577.

⁴ *Duncan v. Rodecker*, 90 Wis. 1, 62 N. W. Rep. 533, 534, per Newman, J.

of an easement for the support of the building conveyed to the plaintiff and for a partition would have passed to the plaintiff as an incident or appurtenance to the land conveyed.¹ No doubt, the mention of the wall in the conveyance was of something additional to the land intended to be conveyed. There is no implied easement in the wall, because the deed expresses the interest intended to be conveyed. The deed in terms conveys the undivided one half of the wall. * * * It differs little, if at all, from the easement which the law would have implied, in the absence from the deed of that provision.”

651. Each owner of a party-wall has an easement in it for the support of the buildings on his own land.² Such a wall is for the convenience and benefit of the adjoining property. The land covered by a party-wall remains the several property of the owner of each half; but the title of each is qualified by the easement to which the other is entitled.³ Neither is allowed to make any use of the wall that is detrimental to the other.⁴

As each party owns the half of the wall which is upon his land, in the absence of a special agreement, he has no right to have the face of the other's half of the wall finished in any particular manner.⁵

652. The owners of a party-wall built at their joint expense, one-half of its thickness standing on the land of each, are not tenants in common of the wall. The ownership of the wall follows the property in the land which supports it. While common user is presumptive of a tenancy in common in the land and in the wall, such presumption is rebutted by proof of the precise extent of the

¹ Dillman v. Hoffman, 38 Wis. 559; Galloway v. Bonesteel, 65 Wis. 79, 29 N. W. Rep. 262.

² Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632; Fettretch v. Leamy, 9 Bosw. 510; Cutting v. Stokes, 25 N. Y. Supp. 365, 72 Hun, 376; Hendricks v. Stark, 37 N. Y. 106, 93 Am. Dec. 549; Webster v. Stevens, 5 Duer, 553; Sanders v. Martin, 2 Lea, 213, 31 Am. Rep. 598.

³ Gibson v. Holden, 115 Ill. 199, 3 N. E. Rep. 282, 16 Ill. App. 411; Ingals v. Plamondon, 75 Ill. 118; Behrens v. Hoxie, 26 Ill. App. 417; Weill v. Baker,

39 La. Ann. 1102, 3 So. Rep. 361; Brooks v. Curtis, 50 N. Y. 639, 4 Lans. 283; Nat. Com. Bank v. Gray, 71 Hun, 295; Dauenhauer v. Devine, 51 Tex. 480, 32 Am. Rep. 627; Odd Fellows' Hall Asso. v. Hegele, 24 Oreg. 16, 32 Pac. Rep. 679; Burton v. Moffitt, 3 Oreg. 29.

⁴ Negus v. Becker, 143 N. Y. 303, 38 N. E. Rep. 290; Harber v. Evans, 101 Mo. 665, 14 S. W. Rep. 750; Fox v. Mission Free School, 120 Mo. 349, 25 S. W. Rep. 172.

⁵ McCarthy v. Mut. Rel. Asso., 81 Cal. 584, 22 Pac. Rep. 933.

land originally belonging to each owner, and each is then deemed the exclusive owner of so much of the wall as stands on his own land.¹

The fact that a party-wall contract provides that before the adjacent owner shall make any use of such wall he shall pay to the party erecting the same one half of the value of it does not alter the matter of ownership. The wall being a permanent structure, resting equally upon the lots of the two adjacent owners, the title to one-half of the wall belongs to each as a part of his realty. "How he was to pay for it in no way affected his title thereto, the effect of the contract in this regard being merely that he had not a right to use the wall until he had made payment in accordance with his contract."²

According to the English authorities, however, if the precise extent of the land belonging to each owner cannot be ascertained, the presumption is that the party-wall belongs to the owners of the adjoining lands in equal priorities as tenants in common. Each moiety is, however, subject to an easement in favor of the other

¹ *Matts v. Hawkins*, 5 Taunt. 20; *Peyton v. Mayor*, 9 B. & C. 725; *Murly v. McDermott*, 8 Ad. & El. 138; *Brown v. Pentz*, 1 Abb. App. Dec. 227, 231; *Hendricks v. Stark*, 37 N. Y. 106, 93 Am. Dec. 549; *Sherred v. Cisco*, 4 Sandf. 480; *Eno v. Del Vecchio*, 4 Duer, 53; *Andrae v. Haseltine*, 58 Wis. 395, 17 N. W. Rep. 18, 46 Am. Rep. 635; *Graves v. Smith*, 87 Ala. 450, 6 So. Rep. 308, 5 L. R. A. 298; *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60; *Goodrich v. Lincoln*, 93 Ill. 359; *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287; *Burton v. Moffitt*, 3 Oreg. 29. In *Louisiana*, however, it is said there is no division of ownership of a wall in common; the whole belongs jointly and in indivision to the neighboring proprietors without reference to the dividing line between the lots. Thus, one co-proprietor may cause beams or joists to be placed within two inches of the whole thickness of the wall, and his neighbor would have no right to complain unless he had need of the

same space for his own construction. And so the circumstance of a flue being constructed in the lower stories of the wall in that half of it which is on the side of one property, does not establish exclusive ownership in the flues, or destroy the presumption that it was intended for the common use and benefit of both, particularly when the extension of the flues in the upper story, without which it would be useless, lies in the center of the wall. *Weill v. Baker*, 39 La. Ann. 1102, 3 So. Rep. 361, per Fenner, J.

In a Georgia case the owners of adjoining lands with a party-wall between the estates are spoken of as holding the wall as tenants in common. *Montgomery v. Trustees*, 70 Ga. 38.

² *Mickel v. York*, 66 Ill. App. 464, 468, per Waterman, J.; *Gibson v. Holden*, 115 Ill. 199, 3 N. E. Rep. 282; *Klauder v. McGrath*, 35 Pa. St. 128, 78 Am. Dec. 329; *Behrens v. Hoxie*, 26 Ill. App. 417; *Orman v. Day*, 5 Fla. 385; *Cole v. Hughes*, 54 N. Y. 444.

moiety; and of course there can be no partition as between tenants in common.¹

653. It is not necessary that a party-wall should stand half upon each of the adjoining parcels of land. It may stand half upon each, or wholly upon one, and may or may not be the common property of the two proprietors.² Though the wall is of varying thickness at different heights and the offsets are wholly on one side, the wall must be considered as a party-wall throughout its whole extent, upon which either party had the right to make additions.³

654. A party-wall may stand wholly on one estate, though the term "party-wall" is usually applied to a wall built partly on the land of each of two adjoining owners for the benefit of both. "But a division wall may become a party-wall by agreement either actual or presumed, and although such wall may have been built exclusively upon the land of one, if it has been used and enjoyed in common by the owners of both houses for a period of twenty years, the law will presume, in the absence of evidence showing that such use and enjoyment was permissive, that the wall is a party-wall. In such cases the law presumes an agreement between the adjacent owners that the wall shall be held and enjoyed as the common property of both."⁴

The owner of adjoining lots erected a house on each with a

¹ *Watson v. Gray*, L. R. 14 Ch. D. 192; *Cubitt v. Porter*, 8 B. & C. 257; *Wiltshire v. Sidford*, 1 M. & Ry. 404, 8 B. & C. 259.

² *Tate v. Fratt*, 112 Cal. 613, 44 Pac. Rep. 1061, per Belcher, C.; *Barry v. Edlavitch* (Md.), 35 Atl. Rep. 170; *Dorsey v. Habersack* (Md.), 35 Atl. Rep. 96; *Zeininger v. Schnitzler*, 48 Kan. 63, 28 Pac. Rep. 1007, 48 Kan. 66, 29 Pac. Rep. 694; *Fettretch v. Leamy*, 9 Bosw. 510, 530, per Robertson, J.; *Marion v. Johnson*, 23 La. Ann. 597; *Milne's App.*, 81 Pa. St. 54, under a statute.

³ *Tate v. Fratt* (Cal.), 44 Pac. Rep. 1061; *Barry v. Edlavitch* (Md.), 35 Atl. Rep. 170; *Brown v. Werner*, 40 Md. 15; *Dorsey v. Habersack* (Md.), 35 Atl. Rep. 96; *McVey v. Durkin*, 136 Pa. St. 418, 20 Atl. Rep. 541, 26 W. N. C. 522;

Western Nat. Bank's App., 102 Pa. St. 171; *Gordon v. Milne*, 10 Phila. 15; *Beaver v. Nutter*, 10 Phila. 345, does not seem to be in accordance with the other decisions or to be good law.

⁴ *Brown v. Werner*, 40 Md. 15, 20, per Robinson, J. Quoted with approval in *Barry v. Edlavitch* (Md.), 35 Atl. Rep. 170; and in *Dorsey v. Habersack* (Md.), 35 Atl. Rep. 96. In *Spero v. Schultz*, 43 N. Y. Supp. 1016, it was held that specific performance of a contract to purchase a "house and lot" will not be ordered where the house has but three walls, the beams being inserted on the fourth side in a wall on the lot of an adjoining owner, though the vendor has a prescriptive right to the use of the wall for that purpose. *Ingraham and Williams, JJ.*, dissenting.

party-wall between them. He afterwards conveyed both lots to different grantees by deeds recorded the same day. The description in the deeds was by courses and distances; there was a controversy as to the starting-point, so that one grantee claimed that his deed conveyed to him the entire party-wall and two inches beyond, and he brought an action to recover such strip of land. Assuming that his claim in regard to the description was correct, it was held that the wall being a party-wall and, at the time of the conveyance, serving as a support for the beams of the house erected on the adjoining lot, the premises owned by the plaintiff were charged with the servitude of having the beams of that house supported by the wall, so long at least as the building should endure; that the right to use the party-wall necessarily carried with it the right to occupy the two-inch space with the timbers which were to find support in the wall, and to have the buildings and wall remain as they were at the time of the conveyances; that the title to the strip in controversy, even if it is in the plaintiff, is subject to this easement, and actual possession could not be given to him without interfering with this easement.¹

If land is conveyed adjoining a brick building belonging to the grantor, but the deed includes no part of the land on which the wall of the building stands, a right given to the grantee to build against such building does not make the wall a party-wall.²

655. If the agreement does not specify the thickness of the wall, this may be such as is proper and suitable for the size and kind of building specified in the agreement or contemplated by the parties. Though the party subsequently using the wall, and thereby becoming liable for the value of such part of the wall as he makes use of, does not require a wall of the thickness of that erected, and does not use half of the thickness of the wall, he is nevertheless liable for the value of the wall used, having reference to the surface of it, and not to the thickness.³ While it is the duty of one erecting a wall to make it of sufficient strength to support another building similar to the one of which it forms a part, he is not bound to make it strong enough to support any kind of a building which the adjoining proprietor may erect.⁴

656. If an agreement in relation to a party-wall to be built provides for the length of the wall, and the party building it does

¹ Rogers v. Sinsheimer, 50 N. Y. 646.

² Moore v. Rayner, 58 Md. 411.

³ Cutter v. Williams, 3 Allen, 196.

⁴ Gilbert v. Woodruff, 40 Iowa, 320.

not extend it so far, the other party may build it to the stipulated point, and he cannot be restrained by injunction from doing so.¹ But if the point to which the wall was to be extended is in dispute, and is uncertain under the agreement, and an extension of the wall will result in a permanent injury to a portion of the building erected, the court will restrain the extension of the wall until the true meaning and effect of the provision can be determined.²

657. If one encroaches upon the land of his neighbor in erecting the wall of his building which is not a party-wall he may be required to remove it. Where one intending to build a wall entirely upon his own land, by reason of an inaccurate survey, encroached upon his neighbor's land one and three-eighths inches in the foundation below the surface, though there was no encroachment by the wall above the surface, if the neighbor refuses to permit the owner of the wall to enter upon his land to cut off the projecting ends of the foundation stones, a court of equity will be compelled to order the owner of the wall to take it down and rebuild the entire wall from his own side. Such a wall is not a party-wall, and the owner building it has no right at law or in equity to occupy land that does not belong to him, or to enter upon his neighbor's land without his permission.³

Where one erecting a building on his lot by mistake as to the boundary placed the side wall entirely upon his neighbor's land, and the latter being about to build, the two entered into a contract by which the wall was to be permanently used as a party-wall, it was held that the party-wall agreement was not void by reason of a mistake, and that so long as it remained uncanceled, neither the party on whose land the wall was actually built nor his assigns with notice of the contract could eject the builder of the wall or his assigns from the premises covered by the party-wall.⁴

¹ Rector v. Keech, 5 Bosw. 691.

² Rector v. Keech, 5 Bosw. 691.

³ Pile v. Pedrick, 167 Pa. St. 296, 31 Atl. Rep. 646, 647, 36 W. N. C. 220.

⁴ Houghton v. Mendenhall, 50 Minn. 40, 45, 52 N. W. Rep. 269. Dickinson, J. said: "The mistake was as to conditions or circumstances which were related to the agreement entered into only as an *inducement* or *motive* influencing their conduct. It is probably true that they would not have entered

into the agreement had they known that the wall which they stipulated to mutually use and maintain as a party-wall stood wholly on the lot owned by the plaintiff. Whatever influence that consideration might have in inducing a court of equity to relieve a party from the binding stipulations of the contract, that alone does not render inoperative the agreement, in respect to which none of the essential elements of a legal contract were wanting."

658. A purchaser without notice of a party-wall agreement by his grantor to pay part of the cost of an existing wall is not bound by it. If one who has verbally agreed to pay for part of a cost of a party-wall uses it in building upon his land, and then mortgages his land and building to one who has no notice of the mortgagor's agreement to pay for the wall, though he knew that the wall erected by the adjoining owner had been used by the mortgagor in building his house, neither the mortgagee nor a purchaser under a foreclosure of the mortgage is bound by such agreement. The purchaser at the foreclosure sale is not affected by notice given him at the time of the sale.¹

If one owning a brick wall standing entirely upon his land grants to his neighbor the right to use the same by an unrecorded bill of sale or agreement, a subsequent purchaser of the lot upon which the wall stands without notice of such sale of the wall is not bound by the sale, and may enjoin the neighboring owner from using the wall. Such subsequent purchaser is not affected with notice of any right in the adjoining owner to use the wall from the fact that he has erected a light, temporary wooden structure against the wall and has fastened the rafters of it to the wall by iron spikes, and has built out the front of the building so that it appeared to be only a building adjoining the wall.²

659. A purchaser without notice that his grantor has agreed with the owner of adjoining land that he may use a wall on the grantor's land is not bound by such agreement. Under such an agreement an adjoining owner built a frame shop, fastening the rafters with spikes to the brick wall on his neighbor's land. The agreement was not recorded. The land of the owner of the wall was sold at sheriff's sale. The owner of the frame shop afterwards took this down and was putting up a brick building, making use of the wall as a party-wall. It was held that he had no right to do so as against the purchaser at the sheriff's sale, and that the character of the wooden shop resting against the brick wall when such purchaser acquired his property was not sufficient to put him on notice.³

660. Where a building is subject to a mortgage at the time the owner enters into an agreement with the owner of the adjoining land that he may use the wall of his building as a party-wall and

¹ Kells v. Helm, 56 Miss. 700.

² Heimbach's Appeal, 19 W. N. C.

³ Heimbach's Appeal, 19 W. N. C. 69, 7 Atl. Rep. 737.

after he has used it the mortgage is foreclosed, the purchaser at the foreclosure sale takes the property free from the party-wall agreement, provided the party who made use of the wall under such agreement was made a party to the suit. The purchaser at the foreclosure sale becomes the sole owner of the lot and building, including the party-wall, and so much of the joists as were built into the wall by the owner of the adjoining lot.¹

661. A party-wall is in no sense a legal incumbrance upon the property of either owner of the adjacent lots if it has been paid for. The mutual easement of the owners of such wall is a mutual benefit to each, a valuable appurtenant which passes with the title to the property, and not a burden.² A party-wall is not an incumbrance if the agreement under which it was built is a mere personal liability, and therefore is not repugnant to a covenant that the land is free from incumbrances.³

But if the party-wall has not been paid for, and under the covenant for the building of the wall the obligation to pay a portion of the cost of it is not merely a personal covenant, but is a burden which runs with the land and binds the grantees of the original party to pay for one half of the wall when it is used, such obligation is a charge upon the land for which a purchaser who has not assumed the charge may maintain an action for a breach of the covenant against encumbrances in the deed under which he holds.⁴

A party-wall built wholly on one of two contiguous lots of land yet subject to appropriation and use for all purposes of a party-wall by the owner of the other lot is an encumbrance upon the land upon which it stands.⁵

662. A deed which conveys land subject to a party-wall agreement, which the grantee assumes, transfers the burden of the agreement to the grantee, and the covenant to pay for the wall when used

¹ Leavenworth Lodge v. Byers, 45 Kan. 323, 38 Pac. Rep. 261.

² Hendricks v. Stark, 37 N. Y. 106, 93 Am. Dec. 549; Brooks v. Curtis, 50 N. Y. 639, 10 Am. Rep. 545; Mohr v. Parmelee, 11 J. & S. 320; Scott v. McMillan, 4 N. Y. Supp. 434, 76 N. Y. 141; Sebald v. Mulholland, 6 Misc. Rep. 349, 26 N. Y. Supp. 913; Bertram v. Curtis, 31 Iowa, 46; Nalle v. Paggi, 81 Tex. 201, 16 S. W. Rep. 932, 1 L. R. A. 1.

³ Weld v. Nichols, 17 Pick. 538.

⁴ Burr v. Lamaster, 30 Neb. 688, 46 N. W. Rep. 1015, 9 L. R. A. 637; Savage v. Mason, 3 Cush. 500; Mackey v. Harmon, 34 Minn. 168, 24 N. W. Rep. 702.

⁵ Cecconi v. Rodden, 147 Mass. 164, 16 N. E. Rep. 749; Mohr v. Parmelee, 11 J. & S. 320; Giles v. Dugro, 1 Duer, 331.

forms a part of the consideration which he pays for the land. It is as much the duty of the grantee to pay for the wall as it is the duty of one who assumes a mortgage to pay the amount of the mortgage.¹

III. *Using a Party-wall.*

663. A party-wall is used by the owner of an adjoining lot within the meaning of a party-wall contract when he erects a building which is supported, to some extent, by such wall.² "The use which makes him responsible is the use of the wall for his own structure, obtaining support for his own structure. He must have used the party-wall for the support of his own building; he must have broken into the plaintiff's wall for that purpose, or must have made use of it by some permanent, physical attachment of some sort, acquiring support for his own building by that permanent physical attachment."³

One about to erect a large building adjoining a small building already standing on the line of the adjoining lot agreed with the owner of such building that he would build a party-wall of specified dimensions, and that the owner of the adjoining lot should pay a specified sum whenever he should make use of said party-wall "for the support of any building which might thereafter be constructed on said premises." In constructing the party-wall it was necessary to tear down the wall of the existing building, and to attach the building to the new wall. It was held that the owner of the old building was not liable to pay for the wall under the contract by reason that in making repairs he fastened the front wall of his building into the party-wall; or by reason that he covered over the party-wall on the inside of his building with plaster and wainscoting, and on this hung gas-fixtures and coat-racks; or by reason of making any necessary repairs of the old building, which did not amount to a construction of a new building.⁴ As was said in a similar case in Massachusetts, the plain interpretation of the contract is that the owner of the old building incurred no liability to pay for the value of the wall until he should make some use of it in the erection of a new building, or of some addition to the old one.⁵

¹ Stewart v. Aldrich, 8 Hun, 241.

³ Heiland v. Cooper (Pa.), 38 W. N.

² McEwen v. Nelson, 40 Ill. App. C. 560.

272; Molony v. Dixon, 65 Iowa, 136, 4 Fox v. Missions Free School, 120 Mo. 349, 25 S. W. Rep. 172.

21 N. W. Rep. 488, 54 Am. Rep. 1; 5 Shaw v. Hitchcock, 119 Mass. 254,

Zugenbuhler v. Gilliam, 3 Iowa, 391. per Colt, J.

664. One makes use of a party-wall within the meaning of an agreement that he shall pay half of its value when he uses it, if his building is fastened to, or leans upon, the party-wall to such an extent as not to be secure without this support.¹ But the lateral support to constitute a use must be more than merely incidental. Thus, where a wooden warehouse is framed against a brick wall built as a party-wall, one half on each of two adjoining lots, though no joists or other timbers are let into the wall, if the sides of the building and of the roof are attached to the wall in a permanent manner, there is a use of the wall which renders the owner of such warehouse liable under a statute for half of the value of the wall.²

The erection of a temporary shed, ten feet high, and open on two sides, with one end of its batten roof resting on a scantling, nailed to a two-story partition-wall on the adjoining lot, is not such an appropriation of the wall as will charge the owner of the shed with contribution, or justify his grantee in assuming that such contribution has been paid, so as to entitle him to make permanent use of the partition-wall without contributing to its cost. "Now, before a neighbor should be charged with the burden of a party-wall, it must appear that he intended to make it a wall in common. If the use to which he puts it is of so slight and temporary a character as that it could not reasonably and fairly be said that he intended to appropriate and utilize the wall permanently, he should not be charged with the burden imposed by the statute. As used in this State, the word "use" has reference to the habitual or permanent employment of the means to the accomplishment of a purpose; and this purpose is the utilization of the standing wall as part of some permanent structure. Temporary or provisional utilization

¹ *Kingsland v. Tucker*, 44 Hun, 91, 8 N. Y. St. 460. See decision of Court of Appeals, referred to below, reversing this decision partly, at least, by reason of the terms of the party-wall contract. *Allen v. Cass-Stauffer Co.*, 11 Pa. Co. Ct. 231; *Heiland v. Cooper* (Pa.), 38 W. N. C. 560.

² *Deere v. Weir-Shugart Co.*, 91 Iowa, 422, 424, 59 N. W. Rep. 255. "It is true that a most important use of a party-wall is to give support to the buildings to which it is common, as by bearing weight of floors and roof, but

it is not the only use, and in many cases it is not the chief one. Walls are not only important to support floors and roofs, but they are necessary to inclose buildings, and make them fit for use. The evidence in this case tends to show that the wall has been made an essential part of the warehouse, and that the use which the defendant is making of it is designed to be permanent." Per Robinson, J. And see *Nolan v. Mendere*, 77 Tex. 565, 14 S. W. Rep. 167, 19 Am. St. Rep. 801.

will not suffice to charge the adjoining owner, nor will such use justify a purchaser in assuming that all rights with reference to party-walls between neighbors have been adjusted."¹

665. If one erects on his own land a wall for a building against a party-wall already erected on an adjoining lot, but does not attach it thereto, and the party-wall is not necessary for its support, the fact that he relies upon the party-wall for protection, and so constructs his own of poorer materials than are generally used for outside work, does not show such a "use" of such wall as to render him liable for one half of its value.²

If one owner, by reason of defects in the party-wall, erects an independent wall which touches the party-wall in some places, but is not tied or anchored to it, and is sufficient by itself for the support of the building to be erected, such incidental lateral support does not constitute a use of the party-wall. This is clearly the law in case the contract calls for the use of the party-wall for the support of the beams of a building to be built adjoining such wall.³

A purchaser of a lot of land agreed with his grantor to erect a party-wall partly upon the land of each, and it was provided that whenever the grantor should "use said wall by erecting a building on the lot adjoining, * * * putting the joists of the building in said wall," then he should pay one half of the cost of said wall. The grantor afterwards erected a two-story brick building on the adjoining lot, capable of lasting many years, using the party-wall as one of the walls of his building, but did not insert his joists therein. It was held that he was liable for one half of the cost of the party-wall, inasmuch as the use of the wall was the thing contracted for, and that putting the joists into it was only an incident.⁴

666. Using a party-wall means making use of it in the process of constructing a building on the adjoining lot, and the owner who erects such building is the person who uses the wall. The liability to pay for one half of the cost of the wall does not extend to the grantee or mortgagee of such building. The heirs or assigns of the original party to the contract are not liable under it unless they

¹ *Beggs v. Duling* (Iowa), 70 N. W. Rep. 732, per Deemer, J. See also *Dixon*, 65 Iowa, 136, 21 N. W. Rep. 488, 54 Am. Rep. 1.

² *Nolan v. Mendere*, 77 Tex. 565, 14 S. W. Rep. 167. ³ *Kingsland v. Tucker*, 115 N. Y. 574, 22 N. E. Rep. 268, reversing 44 Hun, 91, 8 N. Y. St. 460.

⁴ *Sheldon Bank v. Royce*, 84 Iowa, 288, 50 N. W. Rep. 986; *Molony v. Greenwald v. Kappes*, 31 Ind. 216.

have used the wall. The continuance of the building after its erection is not the use of the wall within the meaning of the contract.¹

The party by whose orders a house is erected and an existing party-wall built by the owner of the adjoining land is used is the builder, who is liable for half the value of the wall.²

Where one of two owners of adjoining lots rebuilds the party-wall between the buildings on such lots, under a contract that the other owner shall pay part of the cost of rebuilding, when he rebuilds his own house and uses the new foundation and a wall, or when he sells his house, an action cannot be maintained against the latter until he actually rebuilds or sells; and an extension by him of a frame house then standing on the lot a few feet towards the street, and which rested on the new foundation wall, was not regarded as a rebuilding within the meaning of the contract.³

667. The sale of the adjoining lot has been regarded as a use of a party-wall under an agreement to pay part of its costs when used. Where one builds a party-wall on the line between his land and that of the adjoining proprietor under an agreement by the latter that he "will do what is right about it" when he desires to use the wall, the liability of the latter to pay one-half of the cost of the wall arises upon the sale of his lot to another, as thereby he not only renders it impossible for him to use the wall himself, but also derives benefit from it by conveying to his grantee the right to use it.⁴ "Where a party thus renders impossible the performance of the contract upon his own part, to the detriment of the other contracting party, there can be no doubt of his liability under the contract, and that a right of action against him immediately accrues. It would be unconscionable to allow one of the parties to a contract to receive the benefits thereof, and then repudiate it with impunity. But we are further of the opinion that the sale of the lot carrying with it one-half of the wall erected by the owner of the adjoining lot at his own expense for the joint benefit of both lots was a use of the wall within the meaning of the contract, and thereby fixed the grantor's liability."⁵

¹ Pfeiffer v. Matthews, 161 Mass. 487, 37 N. E. Rep. 571.

² Davids v. Harris, 9 Pa. St. 501; Maine v. Cumston, 98 Mass. 317.

³ Elliston v. Morrison, 3 Tenn. Ch. 280.

⁴ Nalle v. Paggi, 81 Tex. 201, 16 S. W. Rep. 932; Rawson v. Bell, 46 Ga. 19.

⁵ Nalle v. Paggi, 81 Tex. 201, 16 S. W. Rep. 932, 933, 13 L. R. A. 50, per Marr, J.

IV. *Whether the Agreement Runs with the Land.*

668. A party-wall agreement may be a personal agreement binding only the parties to it, or it may be a covenant running with the land, and binding upon subsequent purchasers. It is competent for the parties to provide who shall build the wall, who shall receive payment for it, and who shall be liable to make payment. Whether a party-wall agreement is personal or constitutes a charge upon the lands is determined by the expressed intention of the parties, and the existence of any interest in the land raised by force of its covenants. The agreement runs with and charges the land, where it provides that either party, his heirs or assigns, may erect a party-wall, and that the other party, his heirs or assigns, shall have the right to use the wall by paying therefor, at the time the same shall be used, one-half of the then value of the portion so used, to the party who may have erected the wall, his heirs or assigns, especially if the final provision is that the agreement shall be construed as a covenant running with the land.²

While the authorities are not altogether harmonious with respect to the legal effects of covenants and agreements providing for the construction of party-walls between adjacent proprietors, yet the decided weight of authority establishes the position that an agreement under the hands and seals of such parties, containing the usual covenants and stipulations, will, when duly delivered and acted upon, create cross-easements in the respective owners of the adjacent lots, with which the covenants in the agreement will run so as to bind all persons succeeding to the estates to which such easements are appurtenant.³ "A covenant is said to run with the land when

¹ Pillsbury v. Morris, 54 Minn. 492, 56 N. W. Rep. 170.

² Mott v. Oppenheimer, 135 N. Y. 312, 31 N. E. Rep. 1097, 15 N. Y. Supp. 166. Gray, J., in the Court of Appeals, reviews the previous cases of Cole v. Hughes, 54 N. Y. 444; Scott v. McMillan, 76 N. Y. 141, and Hart v. Lyon, 90 N. Y. 663, and shows that the agreements in those cases were personal only, and imposed no burden upon the land. See, also, Guentzer v. Juch, 4 N. Y. Supp. 39; Brown v. McKee, 57 N. Y. 684; Roche v. Ullman, 104 Ill. 1,

11; Mackey v. Harmon, 34 Minn. 168, 24 N. W. Rep. 702.

³ Roche v. Ullman, 104 Ill. 1, 19, per Mulkey, J., substantially in his language, citing Keteltas v. Penfold, 4 E. D. Smith, 122; King v. Wight, 155 Mass. 444, 29 N. E. Rep. 644; Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Platt v. Eggleston, 20 Ohio St. 414; Savage v. Mason, 3 Cush. 500; Maine v. Cumston, 98 Mass. 317; Standish v. Lawrence, 111 Mass. 111; Dorsey v. St. Louis, A. & T. H. R. Co., 58 Ill. 65; Sterling

either the liability to perform it or the right to take advantage of it passes to the assignee of the land. The liability to perform and the right to take advantage of this covenant both pass to the heir or assignee of the land to which the covenant is attached.”¹ In a recent case in Minnesota, Mr. Justice Mitchell said: “Without going into any general discussion of the very abstruse and technical learning of the books as to what covenants do and what do not run with the land, it is sufficient to say that it is settled by the great weight of authority that the covenants of party-wall contracts, like the one under consideration, do run with the land and that all their benefits and burdens — the liability to perform and the right to take advantage of them — both pass to the heir or assignee of the land to which the covenant is attached. This doctrine is really of equitable origin and proceeds upon the theory that such covenants are not to be considered as merely personal or collateral and detached from the land; that they have direct and immediate reference to the mode of occupying and enjoying the land, and are intended to be beneficial to the owner as owner, and to no other person; that they in effect create a mutual easement in each tract for the benefit of the other.”²

669. If the agreement raises mutual easements and shows an intention that these shall inhere in the land, it runs with it. An agreement under seal between the owners of adjoining lots, which was duly acknowledged and recorded, provided that either party might place a division wall one-half on the land of each, and that the other party, upon using the wall, should pay one-half the expense to the extent of his use, and that the agreement should bind them, their heirs, assigns and representatives forever. The agreement was held to run with the land. “There was nothing which limited the building of the wall to the parties to the agreement, or during their ownership of their respective premises. On the contrary, it is expressly provided that the agreement shall be binding on them and their heirs and assigns forever, meaning clearly that the heirs and assigns of each shall succeed with the estate to the same rights and liabilities under the agreement which

Hydraulic Co. v. Williams, 66 Ill. 393; 211; Weyman v. Ringold, 1 Bradf. 40; Rindge v. Baker, 57 N. Y. 209, 15 Am. Giles v. Dugro, 1 Duer, 331.

Rep. 475, note to Spencer's Case, ¹ Savage v. Mason, 3 Cush. 500.

Smith's Leading Cases (6th Am. ed.), ² Kimm v. Griffin (Minn.), 69 N. W. Rep. 634.

their predecessor in title had or might have. * * * Such being the purpose of it, the next question is whether the agreement, as thus construed, can be carried into effect. We think it can be, and that it creates mutual covenants running with each lot. The form of the instrument is plainly sufficient. It is under seal, binds the heirs and assigns of the respective parties, and is duly acknowledged and recorded. The fact that it does not purport in terms to create covenants running with the land is not of much moment. The effect of the instrument is to be gathered from it as a whole. Where one party covenants with another in respect of land, and at the same time with and as a part of making the covenant, neither parts with or receives any title or interest in the land, nor creates an easement or a right in the nature of an easement for the benefit of the land, such a covenant is at best but a mere personal contract.¹ In the present case the agreement created an easement of use and support in favor of each lot-owner, and her successors in title, in the half of the wall which stood on the other lot, and in the land under the same. Each lot of land became entitled, therefore, to the benefits, and subject to the burdens arising from the covenants contained in the agreement, and relating to the erection and maintenance of the wall. They inhered in and belonged to it."²

670. If the covenant is not of a nature that the law permits to be attached to the estate as a covenant running with the land, it cannot be made such by agreement of the parties.³ Where the agreement is nothing more than a simple contract which in law has no greater force than a license, there is no priority of contract or estate which will authorize a recovery upon it in an action at law. The contract is in such case personal, is not assignable at law, and the right to enforce it and the liability upon it rests with the parties to it alone.⁴ "But it is said that, by express contract between the parties, the agreement was to be construed as a covenant running with the land. That, however, is a matter of no importance. The

¹ *Morse v. Aldrich*, 19 Pick. 449; *Savage v. Mason*, 3 Cush. 500; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, 118 Mass. 156; *Norcross v. James*, 140 Mass. 188, 190, 2 N. E. Rep. 946.

² *King v. Wight*, 155 Mass. 444, 446, 29 N. E. Rep. 644, per Morton, J.

³ *Gibson v. Holden*, 115 Ill. 199, 3 N. E. Rep. 282, 56 Am. Rep. 146;

Holden v. Gibson, 16 Ill. App. 411; *Brewer v. Marshall*, 18 N. J. Eq. 337, 19 N. J. Eq. 537, 97 Am. Dec. 679.

⁴ *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60; *Wilmurt v. M'Grane*, 45 N. Y. Supp. 32, per Rumsey, J., citing *Masury v. Southworth*, 9 Ohio St. 340,

348.

covenant runs with the land as the necessary result of the relation of the parties who make the covenant at the time it is made, and because the parties making the covenant have interests in the lands which are the subject of it. The contracting parties may, by the express terms of their contract, provide that the covenant shall not run with the land, although, if nothing was said about it, it would so run; but, however clearly and strongly expressed may be the intent and agreement of the parties that the covenant shall run with the land, yet, if it be of such a character that the law does not permit it to be attached, it cannot be attached by agreement of the parties, and the assignee will take the estate clear of any such covenant.”

671. According to all the authorities it is certain that a party-wall covenant runs with the land when it is so intended and there is a privity of estate between the parties. “A covenant is said to run with the land, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. The liability to perform, and the right to take advantage of, this covenant, both pass to the heir or assignee of the land to which the covenant is attached. This covenant can by no means be considered as merely personal or collateral, and detached from the land. There was a privity of estate between the covenanting parties in the land to which the covenant was annexed. The covenant is in terms between the parties and their respective heirs and assigns; it has direct and immediate reference to the land; it relates to the mode of occupying and enjoying the land; it is beneficial to the owner as owner, and to no other person; it is in truth inherent in and attached to the land, and necessarily goes with the land into the hands of the heir or assignee.”¹

672. Where one owning adjoining lots of land conveys one of them by a deed which contains a party-wall agreement, this becomes a covenant running with the land. Such a deed, duly acknowledged and recorded, contained the following clause: “It is understood and agreed that the partition wall of any building hereafter erected upon the granted premises, or the adjacent lot on either side, may be placed one-half on the granted premises and one-half on the adjacent lot, and the owner of the lot adjacent to such building so erected shall, whenever he uses such wall, pay one-half the

¹ *Savage v. Mason*, 3 Cush. 500, 505, per Fletcher, J.; *Brewer v. Marshall*, 18 N. J. Eq. 337.

cost of the same, or so much thereof as he may use." A grantee erected a partition wall, one half on the granted premises, and one half upon the adjoining land of the grantor. The grantor then conveyed his adjoining lot to another by a deed with covenants of warranty against all encumbrances, and this grantee in like terms conveyed to still another, who built a house thereon and made use of so much of the partition wall as stood upon the land conveyed to him. It was held that this last grantee was liable to the grantee of the other lot who built the wall, either according to the covenant in the deed to him or according to the value of the wall.¹

673. Some authorities hold to the rule that a covenant relating to a party-wall to be built does not run with the land unless there is some privity of estate between the covenantor and the purchaser of the land so burdened.² "The obligation of all contracts is ordinarily limited to those by whom they are made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate."³

674. Accordingly there is much authority to the effect that a covenant or agreement between adjoining proprietors to build a party-wall, where there is no relation of vendor and purchaser, is personal to both parties. The right to exact payment does not pass to the grantee of the one, and the obligation to pay does not rest upon the grantee of the other. The one building the wall is entitled to recover the amount agreed to be paid by the other, though the wall was first used by the grantee of the latter, and though the builder of the wall had conveyed his lot to the same grantee. The contract to pay for the party-wall is personal to the builder of the wall and does not pass to his grantee.⁴ The contract

¹ Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283. To like effect, see Mithoff v. Hughes, 5 Ohio C. C. 120.

² Spencer's Case, 5 Coke Rep. 16a, 1 Smith's Lead. Cas. 106; Webb v. Russell, 3 T. R. 393; Huling v. Chester, 19 Mo. App. 607; Brewer v. Marshall, 18 N. J. Eq. 337; Davids v. Harris, 9 Pa. St. 501; Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611.

³ Cole v. Hughes, 54 N. Y. 444, 448, 13 Am. Rep. 611, per Earl, C.

⁴ Hart v. Lyon, 90 N. Y. 663; Scott

v. McMillan, 76 N. Y. 141, 8 Daly, 320, 4 N. Y. Supp. 434; Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Kearn v. Sossan, 9 N. Y. St. Rep. 25; Harsha v. Reid, 45 N. Y. 415; Curtiss v. White, Clarke Ch. 389; Frohman v. Dickinson, 11 Misc. Rep. 9, 31 N. Y. Supp. 851, 1 N. Y. Annot. Cas. 332; Sebald v. Mulholland, 6 Misc. Rep. 349, 26 N. Y. Supp. 913; Weeks v. McMillan, 13 Daly, 139; Squier v. Townshend, 2 City Ct. 142; Squires v. Pinkney, 13 N. Y. St. Rep. 749; Coffin v. Talman, 8 N. Y. 465; Pillsbury v. Morris, 54

to pay for the wall when used by the owner of the adjoining lot is also personal to him, and is not discharged by his conveyance to another.¹ It is even held that under such agreement payment cannot be enforced by the grantee of the party who built the wall, though the agreement also provided that it should be construed as a covenant running with the land.²

675. When the contract is personal the use of the wall by a grantee of the original party is a use of it by him within the meaning of the contract.³ According to some decisions, a subsequent or remote grantee of the original party to the agreement is not bound to pay for any part of the wall, though he first uses the wall which he finds already constructed partly upon his land, and though he purchased with knowledge of the agreement and of the fact that the payment agreed upon had not been made.⁴

676. The purchaser of the estate burdened with the liability to pay a part of the cost of a party-wall whenever he shall use it, is not liable in an action at law, unless the covenant to pay is one running with the land. A covenant does not run with the land, unless there was a relation of privity of estate between the covenantor and the covenantee at the time the covenant was made. If one making such covenant neither parts with nor receives any interest in the land as a part of the covenant, this is at best merely personal and

Minn. 492, 56 N. W. Rep. 170; Bloch v. Isham, 28 Ind. 37, 92 Am. Dec. 297; Gibson v. Holden, 115 Ill. 199, 3 N. E. Rep. 282, 56 Am. Rep. 146, 16 Ill. App. 411; Behrens v. Hoxie, 26 Ill. App. 417; Huling v. Chester, 19 Mo. App. 607; Todd v. Stokes, 10 Pa. St. 155; Gilbert v. Drew, 10 Pa. St. 219; Davids v. Harris, 9 Pa. St. 501; Hart v. Kucher, 5 S. & R. 1; Nalle v. Paggi (Tex.), 9 S. W. Rep. 205, 1 L. R. A. 33.

¹ Frohman v. Dickinson, 11 Misc. Rep. 9, 31 N. Y. Supp. 851. Under a statute of Pennsylvania which provided that "the first builder shall be reimbursed for one moiety of the charge of the party-wall," it was held, that the claim to compensation for the use of the wall was personal to the first builder, a mere chose in action, and not a lien on the land, and did not

pass to a grantee of the building of which it was a part by a conveyance of the lot and building with its appurtenances. The claim, moreover, was only a personal charge against the builder of the second house. Hart v. Kucher, 5 S. & R. 1; Gilbert v. Drew, 10 Pa. St. 219; Todd v. Stokes, 10 Pa. St. 155; Bell v. Bronson, 17 Pa. St. 363. This was changed by the statute of Apr. 10, 1849. See § 639.

² Sebald v. Mulholland, 6 Misc. Rep. 349, 11 Misc. Rep. 714, 26 N. Y. Supp. 913, 31 N. Y. Supp. 863.

³ Scott v. McMillan, 8 Daly, 320, 4 N. Y. Supp. 434; Squires v. Pinkney, 13 N. Y. St. Rep. 749.

⁴ Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Scott v. McMillan, 76 N. Y. 141, 8 Daly, 320, 4 N. Y. Supp. 434; Weeks v. McMillan, 13 Daly, 139.

does not bind his grantee.¹ This is the strict rule of law, which is not everywhere adhered to.

677. There are cases however in which it is held that an equity attaches to the property, where one purchases with knowledge that his grantor or other predecessor in the title has entered into such a covenant or agreement and has conveyed the land without fulfilling the same. "The duty of paying for one-half the wall being a continuing liability resting upon the owner of the lot in his character of owner, and this not having been paid at the time of appellant's purchase, it is to be presumed that in becoming a purchaser, and thus assuming the relation of owner himself, he paid less for the property by the amount of the incumbrance than he otherwise would have done. Such being the case, it would now be highly inequitable to permit him to enjoy the benefit of the wall without reimbursing the owner of the wall for one-half its cost."²

In equity the rules at law as to the necessity of the covenant's running with the land have been held not to apply; nor in equity is there any necessity of there being a contemporaneous privity of tenure or estate, in order to make the covenant something more than a personal one and to fasten it upon the land mentioned in the covenant. "In order to successfully invoke equitable interposition in cases of this sort, all that is necessary is a valid agreement or covenant, and notice thereof to the purchaser. When these things are shown, a court of equity, disregarding the technical rules of law, and looking alone to the substance and justice of the agreement, such as the one now before us, will enforce it as well against the purchaser with notice as against the original party."³

678. A purchaser who makes use of a wall without paying therefor, with full notice of the facts, is liable, according to some authorities, to the party who built the wall or to his grantee, in an action at law to recover half of its cost. "This liability is based upon the benefit he receives from the use of the wall, which was erected with his neighbor's money, and the full notice he possesses that his grantor had not paid for the wall."⁴ Where the covenant

¹ Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433; Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611.

² Roche v. Ullman, 104 Ill. 1, 19, per Mulkey, J.

³ Sharp v. Cheatham, 88 Mo. 498, 503, 57 Am. Rep. 433, per Sherwood, J.

⁴ Pew v. Buchanan, 72 Iowa, 637, 638, 34 N. W. Rep. 453, per Beck, J. And see Wickersham v. Orr, 9 Iowa, 253, 74

in relation to the party-wall is one that runs with the land the obligation to pay rests upon the grantee who uses the wall. "It is in fact and in contemplation of the parties a covenant for the benefit of both parcels of land, and affecting in a substantial way the mode of their enjoyment by their respective owners, and the obligation to pay the appropriate consideration was by terms of the covenant placed upon those who should succeed to the promisor's title and enjoy the reserved right of using the wall."¹

A party-wall contract provided that one of two adjoining owners should build a party-wall and that the other, his heirs and assigns, should pay the party who erected the wall one-half the value of such wall when he or his heirs or assigns should use the same. The contract was duly acknowledged and recorded. After the wall was built the owner of the vacant lot conveyed the same by general warranty deed, and the title passed through successive conveyances to a purchaser who appropriated and used the wall. It was held that the original party to the contract was primarily and personally liable to the successor in title of the party who built the wall for one-half the value of such wall; and that the successive grantees of the party who undertook to pay for the wall were liable in the inverse order of their deeds.²

679. The record of a party-wall agreement that runs with the land is constructive notice to all purchasers of the land affected by it, and is as effectual and binding as actual notice.³

But if the contract is personal only, and does not run with the land, constructive notice by the record does not bind subsequent purchasers. They are not bound by such contract, even if they have notice of it.⁴

680. The property in a party-wall under a covenant running with the land is in the party who builds the wall, until he conveys the building of which the party-wall is a part; but by his conveyance without reservation the property in the whole wall passes to his

Am. Dec. 348; *Platt v. Eggleston*, 20 Ohio St. 414; *Garmire v. Willy*, 36 Neb. 340, 54 N. W. Rep. 562. 54 N. W. Rep. 562; *King v. Wight*, 155 Mass. 444, 29 N. E. Rep. 644; *Knowles v. Ott* (Tex. Civ. App.), 34 S. W. Rep. 295.

¹ *Mithoff v. Hughes*, 5 Ohio C. C. 120, 123, per Shattuck, J.

² *Knowles v. Ott* (Tex. Civ. App.), 34 S. W. Rep. 295.

³ *Garmire v. Willy*, 36 Neb. 340,

⁴ *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611; *Nalle v. Paggi* (Tex.), 9 S. W. Rep. 205, 1 L. R. A. 33.

grantee who may enforce the agreement against the owner of the adjoining land when he shall make use of the wall.¹

Where one builds a wall partly on the land of his neighbor, under an agreement that his neighbor shall have the right to use it when he pays half the cost of it, the wall does not become a party-wall until this condition is complied with.²

681. The original party to a party-wall covenant is under no obligation to pay any part of the cost of the wall, if he makes no use of it; but his grantee who has used the wall is the person liable for such payment.³ When the agreement provides that when the lot adjoining that on which the party-wall is first erected shall be built upon and the wall used, the owner of said adjoining lot shall pay half the cost of the wall, neither he nor his grantee with notice can use the wall without compliance with the terms under which it was built. When either of them makes use of the wall, the law implies an *assumpsit* for one half the cost. The agreement in such case defines the rights of the grantee who may become the owner of the adjoining lot; and the liability for payment arises out of the exercise of those rights.⁴

682. Under such an agreement the grantee of the owner who built the party-wall may recover from the grantee of the other lot, whenever the latter makes use of the wall as a party-wall. The payment is deemed to be due to him whose property is taken and used, although the agreement and the deeds may not explicitly direct the payment to be made to him.⁵

¹ *Maine v. Cumston*, 98 Mass. 317; *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283; *Eberly v. Behrend*, 20 D. C. 215, 19 Wash. L. Rep. 759; *Thomson v. Curtis*, 28 Iowa, 229; *Pew v. Buchanan*, 72 Iowa, 637, 34 N. W. Rep. 453, under the statute of Iowa; *Tomblin v. Fish*, 18 Ill. App. 439; *Platt v. Eggleston*, 20 Ohio St. 414; *Mithoff v. Hughes*, 5 Ohio C. C. 120; *McGittigan v. Evans*, 8 Phila. 264; *Durel v. Boisblanc*, 1 La. Ann. 407; *Murrell v. Fowler*, 1 La. Ann. 165; *Lavillebeuvre v. Cosgrove*, 13 La. Ann. 323.

² *Masson's Appeal*, 70 Pa. St. 26; *Glover v. Mersman*, 4 Mo. App. 90.

³ *Standish v. Lawrence*, 111 Mass. 111; *Maine v. Cumston*, 98 Mass. 317; *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283; *Garmire v. Willy*, 36 Neb. 340, 54 N. W. Rep. 562; *Stehr v. Raben*, 33 Neb. 437, 50 N. W. Rep. 327; *Jordan v. Kraft*, 33 Neb. 844, 51 N. W. Rep. 286; *Burr v. Lamaster*, 30 Neb. 688, 46 N. W. Rep. 1015.

⁴ *Standish v. Lawrence*, 111 Mass. 111, per Wells, J.

⁵ *Brown v. Pentz*, 1 Abb. Dec. 227, decided by an equally divided court, but followed in *Burlock v. Peck*, 2 Duer, 90; *Eno v. Del Vecchio*, 4 Duer, 53, 6 Duer, 17; *Keteltas v. Penfold*, 4 E. D. Smith, 122; *Richardson v.*

683. An action at law may be maintained to recover of one using a party-wall, under the usual party-wall covenant, his proportion of the cost of the same.¹ Though such agreement creates an equitable easement or charge upon the land of the party who does not build the wall, in favor of the party who does, which might be enforced by an appropriate equitable suit,² an action at law may be maintained against the party liable for a portion of the cost or value of the wall.³

684. If the party-wall agreement provides that the value of the wall used by the adjoining owner shall be fixed by an appraisal by third persons, a demand for payment and an action to recover therefor before such appraisal is made, or something is done to prevent or avoid it, it is premature.⁴ If the party liable to pay for the wall joins in the arbitration he concedes his liability to pay the amount of the award, and cannot repudiate his liability after the award is made.⁵

685. It is no defense to a suit for half the cost of a party-wall that before it was used it had been impaired by fire, and the builder had collected insurance, in case the agreement provided that the one who uses the wall shall pay one half the cost of the wall whenever he uses it. It is no defense under such contract that the party who subsequently uses the wall is obliged to pay out money for repairs before using it. The contract in such case is to pay half the cost of the wall, and not half of what the wall might reasonably be worth at the time he should use it.⁶

Tobey, 121 Mass. 457, 23 Am. Rep. 283; Thompson v. Curtis, 28 Iowa, 229; Lavillebeuvre v. Cosgrove, 13 La. Ann. 334; Bruning v. New Orleans, C. & B. Co., 12 La. Ann. 541; Murrell v. Boisblanc, 1 La. Ann. 407.

¹ Walker v. Stetson, 162 Mass. 86, 38 N. E. Rep. 18; Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Standish v. Lawrence, 111 Mass. 111; Maine v. Cumston, 98 Mass. 317; Cutter v. Williams, 3 Allen, 196; Savage v. Mason, 3 Cush. 500.

² Stehr v. Raben, 33 Neb. 437, 50 N. W. Rep. 327.

³ Garmire v. Willy, 36 Neb. 340, 54 N. W. Rep. 562; Keating v. Korfhage, 88 Mo. 524; Mackey v. Harmon, 34 Minn. 168, 24 N. W. Rep. 702; Burr v. Lamaster, 30 Neb. 688; 46 N. W. Rep. 1015, 9 L. R. A. 637; Stehr v. Raben, 33 Neb. 437, 50 N. W. Rep. 327.

⁴ Thorndike v. Wells Memorial Asso., 146 Mass. 619, 16 N. E. Rep. 747.

⁵ Bedell v. Kennedy, 109 N. Y. 153, 16 N. E. Rep. 326, 38 Hun, 510.

⁶ Thornton v. Royce, 56 Mo. App. 179.

686. One who builds a party-wall under the usual agreement with the adjoining proprietor has a lien upon the land of such proprietor using such wall for the compensation due under such agreement,¹ according to the decisions in some States.

V. *Windows and Other Openings In.*

687. Neither owner of a party-wall has the right to leave or make openings for doors or windows in it.² "The ownership of the land under a party-wall remains in the several owners, subject to the easement of supporting the building upon each lot by means of the common wall. This easement is limited to what is necessary for that purpose. The maintenance of windows by one owner against the objection of the other is inconsistent with the title and rights of the latter. By usage the words 'party-wall' and 'partition-wall' have come to mean a solid wall. Various reasons of inconvenience or peril have been assigned for the doctrine, but they are all referable, we think, to the general doctrine that the easement is only a limited one, and it is not to be extended so as to

¹ *Nelson v. McEwen*, 35 Ill. App. 100; *Roche v. Ullman*, 104 Ill. 11; *Gibson v. Holden*, 115 Ill. 199, 3 N. E. Rep. 282, 56 Am. Rep. 146; *Stehr v. Raben*, 33 Neb. 437, 50 N. W. Rep. 327.

² *Alabama*: *Graves v. Smith*, 87 Ala. 450, 6 So. Rep. 308, 5 L. R. A. 298.

Delaware: *Pierce v. Lemon*, 2 Houst. 519.

District of Columbia: *Bartley v. Spaulding*, 21 D. C. 47; *Corcoran v. Nailor*, 6 Mack. 580.

Illinois: *Gibson v. Holden*, 115 Ill. 199, 3 N. E. Rep. 282; *Ingals v. Plamondon*, 75 Ill. 118; *Field v. Leiter*, 118 Ill. 17, 6 N. E. Rep. 877.

Indiana: *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287.

Iowa: So provided by statute. Annot. Code 1888, § 3196; *Sullivan v. Graffort*, 35 Iowa, 531.

Louisiana: *Lavillebeuvre v. Cosgrove*, 13 La. Ann. 323; *Oldstein v. Firemen's Build. Assn.*, 44 La. Ann. 492, 10 So. Rep. 928.

Massachusetts: *Normille v. Gill*, 159 Mass. 427, 34 N. E. Rep. 543.

Missouri: *Harber v. Evans*, 101 Mo. 661, 14 S. W. Rep. 750, 10 L. R. A. 41, 20 Am. St. Rep. 646.

New Jersey: *Traute v. White*, 46 N. J. Eq. 437, 19 Atl. Rep. 196.

New York: *National Commercial Bank v. Gray*, 71 Hun, 295; *St. John v. Sweeney*, 59 How. Pr. 175; *Sweeney v. St. John*, 28 Hun, 634; *Nash v. Kemp*, 12 Hun, 592; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Partidge v. Gilbert*, 15 N. Y. 601, 614, 69 Am. Dec. 632; *Cutting v. Stokes*, 72 Hun, 376, 25 N. Y. Supp. 365.

Ohio: *Dawson v. Kemper*, 32 W. L. Bull. 15.

Pennsylvania: *Milne's Appeal*, 81 Pa. St. 54; *Vollmer's Appeal*, 61 Pa. St. 118; *Gordon v. Milne*, 10 Phila. 15; *Vansyckel v. Tryon*, 6 Phila. 401; *Roudet v. Bedell*, 1 Phila. 366.

Texas: *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627.

include rights and privileges not belonging to the character of a wall which is to be owned in common, and in which the rights of each owner are equal.”¹

If the wall is not a party-wall, there is, of course, no objection to the builder's leaving openings in it for windows. Thus, where one owner increases the height of a party-wall by adding one or more stories thereto under such circumstances that the addition does not become a party-wall, he is not precluded from making windows in it.²

688. One owner of a party-wall cannot subject it to any additional burden beyond its use as a wall in common. Any other use, such as making openings in it, subjects it to a servitude foreign to the objects and purposes of such wall under the usual party-wall agreement, or under a statutory provision to like effect. Such limitation of the use of a wall may be asserted either before or after the wall has become one in common by each party's paying his proportionate share of its cost.³ One may be enjoined from making openings for doors or windows in a party-wall, though there is neither any allegation nor proof that the other owner intends ever to use the wall. Whether the other party intends to use the wall or not is quite immaterial, since he has acquired a valuable right in the wall which might be the subject of a sale and transfer, and he should be protected in this right.⁴

If, however, one building a party-wall leaves openings for windows therein, with the knowledge and consent of the owner of the adjoining lot, the latter cannot afterwards change his mind and claim that the insertion of the windows was a violation of the party-wall agreement between the parties.⁵

689. A provision in a party-wall contract that if the owner of the adjoining vacant lot should at any time elect not to use the wall, he shall convey to the owner of the wall so much of the lot as the wall occupies for a stipulated sum, does not affect the character of the wall as a party-wall so long as such election is not made; and the owner of the vacant lot may obtain an injunction

¹ Normille v. Gill, 159 Mass. 427, 34 N. E. Rep. 543; Bedell v. Rittenhouse Co., 5 Pa. Dist. 689; Milne's App., 81 Pa. St. 54.

² Weston v. Arnold, L. R. 8 Ch. 1084.

³ Sullivan v. Graffort, 35 Iowa, 531; Fettretch v. Leamy, 9 Bosw. 510.

⁴ Harber v. Evans, 101 Mo. 661, 14 S. W. Rep. 750.

⁵ Hammann v. Jordan, 129 N. Y. 61, 29 N. E. Rep. 294, 13 N. Y. Supp. 228, 9 N. Y. Supp. 423.

restraining the owner of the wall from making and maintaining openings or windows in such wall.¹

Under a statute which provides that the owner of a city lot who builds before his neighbor builds upon his lot, may rest one half of his wall on the land of his neighbor, and the wall becomes a party-wall when his neighbor pays half the expense of building the wall, such neighbor has no right to have the windows in the wall closed before he makes the wall a party-wall.²

690. Windows may be built or opened in a party-wall when it appears from the contract of the parties that it was their intention to grant this privilege.³ An owner of a lot has a right to open windows in a party-wall where the adjoining owner has covenanted in a deed to preserve to his neighbor an easement of light and air, and has also covenanted for himself, his heirs and assigns, not to erect a wall above a certain height, "unless there shall be left between the buildings a clear space of at least thirty-six inches between the faces of the two walls."⁴

Windows may be built or opened in a division wall built upon an old wall in which the adjoining owner has acquired by prescription a right to rest the timbers of his building; for in such case the right acquired is merely a right to the extent of the use during the period of prescription, and the owner of the wall has the right to build it higher and to make openings in it to such extent as he may choose if he does not interfere with the easement of his neighbor.⁵

¹ Cutting v. Stokes, 72 Hun, 376, 25 N. Y. Supp. 365.

² Oldstein v. Firemen's Build. Asso., 44 La. Ann. 492, 10 So. Rep. 928. Breaux, J., referring to Civil Code, art. 675, said: "There is conflict between the article just referred to and article 505, Civil Code. Under the latter, the ownership of the soil carries with it the improvements. Under the former, he has the right to erect a construction on the owner's property, and to remain the owner until his neighbor may choose to make it a wall in common. Built at his expense, he is the owner. Jeannin v. De Blanc, 11 La. Ann. 465; Lavergne v. Lacoste, 26 La.

Ann. 507. In each of the cases just referred to, the wall which was the subject of litigation, was built at the individual expense of one of the neighbors, and rested upon the line of division of the properties adjacent one to the other. In each it was held that the wall was owned by the proprietor at whose expense it was built."

³ Grimley v. Davidson, 35 Ill. App. 31, 133 Ill. 116, 24 N. E. Rep. 439.

⁴ Weigmann v. Jones, 163 Pa. St. 330, 30 Atl. Rep. 198, 35 W. N. C. 185.

⁵ Barry v. Edlavitch (Md.), 35 Atl. Rep. 170. And see Weston v. Arnold, L. R. 8 Ch. 1084.

691. One of the uses of a party-wall is to afford a complete division between adjoining buildings, and the opening of windows in such a wall is an injury which equity will redress by injunction.¹ “This servitude, imposed *in invitum*, is to be construed with the utmost strictness. It renders the occupation of another’s land lawful only when the wall with which it is occupied satisfies the reason and purpose for which the easement was imposed. The servient owner is compelled to submit to the burden only on the ground that the thing imposed is, in contemplation of law, a benefit equally to him and to the dominant owner; in other words, that it at once stands ready for his enjoyment for all the purposes for which a party-wall is intended to serve. These purposes include several uses. It is intended, in the first place, to serve for the support, at any point, of the beams which the servient owner may reasonably have occasion to insert in a supporting wall. This forbids the construction of openings where beams cannot be inserted and support cannot be afforded. In the next place, it is intended to serve the purpose of a complete division between adjoining houses. This forbids the construction of spaces in it which do not divide. It is no answer to say that the dominant owner stands ready to fill up the openings whenever the servient owner desires to use the wall as a party-wall. That very statement admits that it had not been meantime a party-wall, and the servitude only renders lawful occupation by an actual party-wall.”²

692. If a party-wall has been built with windows in it, either party may close them by boarding them up or otherwise. In a suit by one owner against the other for boarding up such windows, it was shown that this was not done maliciously; and the court said: “The act complained of was on the defendant’s own property, and he had the right to use his property for his own health and enjoyment in such way as he thought best, provided he did not, by doing so, unlawfully injure his neighbor. The plaintiff had no right to keep these spaces open in the wall any more than

¹ Normille v. Gill, 159 Mass. 427; How. Pr. 175; Sweeney v. St. John, 28 Vollmer’s Appeal, 61 Pa. St. 118; Hun, 634; Nash v. Kemp, 12 Hun, 592; Dauenhauer v. Devine, 51 Tex. Atl. Rep. 196; Bartley v. Spaulding, 480, 487, 32 Am. Rep. 627.

21 D. C. 47; National Commercial Bank v. Gray, 71 Hun, 295, 24 N. Y. Supp. 997; St. John v. Sweeney, 59

² Corcoran v. Nailor, 6 Mack. 580, 583, per James, J.

he had the right to make other and new spaces in the wall, as against the right of the defendant to close them whenever it became proper and necessary to the enjoyment of his property he should conclude to do so. For instance, it is admitted that he might close them by building against the wall. So, we think, when it was found that these spaces in his own wall were being used to his injury, he had a right to close them. Not that he had a right to injure his neighbor, but he had a right to protect himself; and having conceded him the right to effectually protect himself, even to the extent of closing the windows, we are unable to see how in law we are able to say to him that he should put in opaque glass instead of boards or brick.”¹

693. No reservation of a right to maintain windows is implied in favor of the grantor's house standing close to the line of the lot conveyed. If one owning two lots of land, upon one of which is a tenement-house built up to the line of the other lot, sells the latter without an express reservation that the purchaser shall not build up to the line of the lot next to the grantor's house, so as to interfere with his windows, no easement to that effect is implied from the conveyance. “It is deemed now to be well settled that, where the owner of two parcels of land conveys one by an absolute and unqualified deed, an easement will be implied in favor of the land retained by the grantor against the land conveyed only where it is apparent, continuous, and absolutely necessary for the enjoyment of the former.² It is apparent in this case that the right to light through the windows in the tenement-house is not absolutely necessary for the enjoyment of these premises. It may be convenient in order that the premises may be used for tenement-house purposes; but there is no pretense that the premises are not useful or valuable

¹ Dawson v. Kemper, 11 Ohio C. Ct. 180, 181, per Swing, J.

² The rule is laid down in the following cases, and there is no need of any further discussion of the subject here: Outerbridge v. Phelps, 13 J. & S. 555, 13 Abb. N. C. 117; Shoemaker v. Shoemaker, 11 Abb. N. C. 80; Scrymser v. Phelps, 33 Hun, 474; Wells v. Garbutt, 132 N. Y. 430, 30 N. E. Rep. 978; Paine v. Chandler, 134 N. Y. 385, 32 N. E. Rep. 18; Keats v. Hugo, 115

Mass. 204, 15 Am. Rep. 80. Mr. Gale, in his work on Easements, says that although his original opinion was that, in cases like that above, an easement was implied in favor of the land retained by the grantor, yet that the weight of authority is now the other way, and that there is no such easement unless it is expressly reserved by the deed. Gale, Easements, 123, 132 *et seq.* See § 136.

for any other purposes, and therefore there is no necessity for reservation of the easement which would entitle the grantor to insist upon it, within the rule laid in the cases above. Besides that, it is settled in this State that no easement for light or air will ever be implied in favor of one city lot over another, and that the doctrine of implied easements of that kind does not exist in this State.”¹

694. Flue in party-wall. — The owner of two lots of land erected a building on one of them, placing a party-wall one-half upon each lot. The party-wall contained a flue for the use of this building, though this flue projected several inches beyond the wall upon the vacant lot. The grantor afterwards conveyed the vacant lot to one who contributed toward the expense of the party-wall, and subsequently gave notice to the owner of the adjoining building of his intention to close up the flue. It was held, however, that the flue was a continuous and apparent servitude upon the lot last purchased, and that, as the purchaser was chargeable with notice of its existence, he took the property subject to its burden and could be enjoined from removing or closing up the flue.²

The term party-wall does not necessarily imply an absolutely solid structure. If it is a general custom in the place where the building is erected to construct flues in party-walls, such custom is evidence of the meaning of the party-wall and of the propriety of constructing the flues in such walls.³

695. If the owner who builds a party-wall extends his cornice or other part of his building across the front of the wall, he has no right to maintain it there. The other owner, when he uses the wall, may cover the front end of the wall which is upon his own land in such manner as he pleases, though the appearance of his neighbor's building is marred by his cutting the cornice or making other changes on his part of the party-wall.⁴

VI. *Right to Build Higher.*

696. Included in the easement of a party-wall is the right of either of the adjacent owners to increase the height of the wall, when it can be done without injury to the adjoining building,

¹ *Wilmurt v. McGrane*, 45 N. Y. 29 N. E. Rep. 294. See, also, *Fettretch Supp.* 32, per *Rumsey, J.*, citing to *v. Leamy*, 9 Bosw. 510, 525.

the last proposition, *Myers v. Gemmel*, 10 Barb. 537.

² *Ingals v. Plamondon*, 75 Ill. 118.

³ *Harmann v. Jordan*, 129 N. Y. 61,

⁴ *Freeman v. Herwig*, 84 Iowa, 435, 51 N. W. Rep. 169; *Pierce v. Lemon*, 2 Houst. 159.

and the wall is clearly of sufficient strength to safely bear the addition.¹

Under a party-wall agreement which provides that the wall first built on the line of the adjoining lots shall be a party-wall, neither party is limited to a party-wall of the height of that first erected. The accident of the first erection of the wall does not for all time determine the height to which either owner may carry up the wall. Either party can use the wall first erected as it is, or he may carry it up as a party-wall of any higher building he may have occasion to erect, provided he does not injure or impair the wall as originally built.² "The wall is a substitute to each for a separate wall, and there can be no implied limitation in his right to use it as he would use his several wall, except that he shall not impair its value to his neighbor. With this limitation it will be presumed that each intended it for all uses and purposes to which the wall of his building would ordinarily and properly be put. That presumption is for the advantage of both, and to the detriment of neither. If the party-wall cannot be built up, neither house can be raised without building a new wall; for if one owner could lawfully build a

¹ **Alabama:** *Graves v. Smith*, 87 Ala. 450, 6 So. Rep. 308, 5 L. R. A. 298, 13 Am. St. Rep. 60.

California: *Tate v. Fratt*, 112 Cal. 613, 44 Pac. Rep. 1061.

District of Columbia: *Fowler v. Saks*, 18 D. C. 570, 7 L. R. A. 649.

Indiana: *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287, 295.

Louisiana: *Oldstein v. Firemen's Build. Assn.*, 44 La. Ann. 492, 10 So. Rep. 928; *Heine v. Merrick*, 41 La. Ann. 194, 5 So. Rep. 760.

Maryland: *Barry v. Edlavitch (Md.)*, 35 Atl. Rep. 170; *Putzel v. Drover's & Mech. Nat. Bk.*, 78 Md. 349, 28 Atl. Rep. 276.

Massachusetts: *Carlton v. Blake*, 152 Mass. 176, 25 N. E. Rep. 83; *Everett v. Edwards*, 149 Mass. 588, 22 N. E. Rep. 52, 14 Am. St. Rep. 462; *Matthews v. Dixey*, 149 Mass. 595, 22 N. E. Rep. 21, 1 L. R. A. 102; *Walker v. Stetson*, 162 Mass. 86, 38 N. E. Rep. 18; *Quinn v. Morse*, 130 Mass. 317, 322.

Missouri: *Harber v. Evans*, 101 Mo. 161, 14 S. W. Rep. 750, 10 L. R. A. 41.

New York: *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545, per Rapallo, J., 14 Lans. 283; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Negus v. Becker*, 143 N. Y. 303, 38 N. E. Rep. 290, 42 Am. St. Rep. 724, 25 L. R. A. 667; *Berry v. Todd*, 14 Daly, 450; *Mittnacht v. Slevin*, 142 N. Y. 683, affirming 67 Hun, 315, 22 N. Y. Supp. 131; *Eno v. Del Vecchio*, 4 Duer, 53; *Webster v. Stevens*, 54 Duer, 553; *Musgrave v. Sherwood*, 54 How. Pr. 338, 53 How. Pr. 311, 60 How. Pr. 339; *Nash v. Kemp*, 49 How. Pr. 522; *Sebald v. Mulholland*, 6 Misc. Rep. 349.

Texas: *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627.

Wisconsin: *Andrae v. Haseltine*, 58 Wis. 395, 17 N. W. Rep. 18, 46 Am. Rep. 635.

² *Matthews v. Dixey*, 149 Mass. 595, 22 N. E. Rep. 61, 5 L. R. A. 102.

several wall upon the part of the wall over his own land, it would not be a right of practical value; he could not build on it a sufficient wall. It is not reasonable to suppose that each party intended that he should never use the wall for a building higher than the one that should be first erected, and a provision to that effect detrimental to both parties and beneficial to neither cannot be presumed.”¹

697. A party-wall should be treated as a structure for the common benefit and convenience of both adjoining estates, and either owner should be permitted to make any use of it as a party-wall that he may desire, either by deepening the foundation or increasing its height so far as it can be done without a permanent injury to the owner.²

There is no restriction implied in an agreement constituting a division wall a party-wall that prevents either party from extending his buildings on his own land beyond such wall, towards either front or rear.³

The owner of a lot who sells part of it, restricting, by condition in the deed, the height of the building to be erected thereon, cannot extend a party-wall built between the two parts above such height for his own exclusive use, but, if extended, it must be built without openings, and the owner of the other part will have the right to use it, on proper payment, by adding to the height of his building.⁴ “It is presumed to be a detriment to the owner of a building to deprive him of the power to make additions to it, and grants and contracts will be construed on that presumption unless it is controlled by their terms. Not only would a provision implied in a grant of a party-wall, that it should not be carried higher than as originally constructed, be contrary to the interests and apparent intention of the parties, but it would not be in accordance with public policy. The public interest is not promoted by putting impediments in the way of erecting buildings, and the law will not be swift to construe the acts of parties so as to produce that effect.
* * * The limitation upon the right of each owner to use the

¹ Everett v. Edwards, 149 Mass. 588, 591, 22 N. E. Rep. 52, per Allen, J.

² Brooks v. Curtis, 50 N. Y. 639, 10 Am. Rep. 545; Negus v. Becker, 143 N. Y. 303, 38 N. E. Rep. 290, 68 Hun, 293, 22 N. Y. Supp. 986; National Commercial Bank v. Gray, 71 Hun, 295, 24 N. Y. Supp. 997.

³ Wolfe v. Frost, 4 Sandf. Ch. 72; Quinn v. Morse, 130 Mass. 317; Matthews v. Dixey, 149 Mass. 595, 22 N. E. Rep. 61, 5 L. R. A. 102.

⁴ Fidelity Lodge v. Bond (Ind.), 45 N. E. Rep. 338.

wall as the lateral wall of such house as he may desire to erect is that he shall not impair the value of the wall to the other owner. If one owner carries up the wall, the addition becomes part of the party-wall, and the owners have equal rights in it, and the value of the wall to either owner cannot be thereby impaired."¹

One conveyed land upon which there was a brick building, bounding it so as to include the whole of a brick wall adjoining other land of the grantor upon which there was a small building, with a provision that the owners on both sides should have the mutual use of "the present partition-wall." The grantor then sold his adjoining property to one who tore down this small building, and erected one much higher and extending much farther along on the partition-wall. The reservation was not of the use of the entire wall of the building conveyed, but only of the partition-wall in actual use as such.²

698. A recital in a party-wall agreement, that one owner, is about to erect a building of a certain number of stories in height does not prevent his erecting a building of a greater number of stories. A party-wall already erected might be increased in height by either owner, provided this could be done without detriment to the strength of the wall, unless the agreement in relation to the wall contained restrictive words prohibiting the building of it beyond a certain height; therefore, a recital as to what was contemplated at the time of entering into the agreement could not restrict the rights of the parties.³

An agreement whereby one purchased the right "to place joists to the depth of four inches and to otherwise build into and against" the wall of his neighbor's house, "and to otherwise use the same as a party or division wall," includes the right to increase the height of said wall.⁴ "In contracting for the use of the wall as a party-wall," say the court, "it was perfectly competent for them to determine the depth to which the joists should be inserted, and, although unnecessary to state it, as it would have been covered by the agreement for the use of the party-wall, the provision to otherwise build into and against the wall does not exclude the general provision. Ascertaining the intention of the parties from the

¹ Everett v. Edwards, 149 Mass. 588,
22 N. E. Rep. 52.

² Price v. McConnell, 27 Ill. 255.

³ Mittnacht v. Slevin, 67 Hun, 315,
22 N. Y. Supp. 131.

⁴ Dorsey v. Habersack (Md.), 35 Atl.
Rep. 96.

written instrument, as we must do, it is perfectly manifest the plaintiff intended to sell, and the defendant intended to purchase, the right to use the wall as a party-wall.”

But an exception to the general rule was made in a case where one purchased a dwelling-house as a private residence upon the representations of the grantor who owned this and several other houses in a block that the property was restricted to use as private residences only, and the grantor afterwards proceeded to build the party-wall of the purchaser's house higher in order to convert his adjoining houses into a private hotel. The purpose for which the wall was made higher was antagonistic to the representations of the grantor, and therefore he was enjoined from building up the party-wall for the purpose of altering the character of the houses. Inasmuch as the purchaser did not assent to the use of the party-wall for the erection of additional stories for business purposes, he should in equity be protected from such use.¹

699. One building up a party-wall to only the height originally provided for is not liable to his neighbor for an injury to his property by the falling of the wall, in the absence of any proof of negligence. Where the owners of adjoining premises agreed that one of them should erect on their boundary line a brick wall suitable to support a three-story brick building, and he erected a two-story building and built a party-wall of corresponding height, and the other having paid half the cost of the wall, conveyed his lot and interest in the wall to one who commenced the erection of a three-story building, and undertook to carry up the party-wall another story, such grantee was not liable for damages occasioned by the falling over of the wall upon the roof of the adjoining building in the absence of any proof of negligence on his part or on the part of the contractor who did the work.² Mr. Justice Gray, delivering the

¹ *Musgrave v. Sherwood*, 60 How. Pr. 339.

² *Negus v. Becker*, 143 N. Y. 303, 308, 310, 38 N. E. Rep. 290, Gray, J., further said: “In this case the wall was the joint property of the parties. It was built for the purposes of a building of three stories in height, and if the plaintiff did not avail himself of his right to erect a building of such a size, that fact was no obstacle to the

defendants building it up, as it had been intended and agreed upon; in order that it might furnish a wall of their own three-story building. They were within the exercise of their legal right in what they did, and it is impossible to see that they assumed any risk in building a wall of the height originally contemplated; so long as they contracted for one of suitable strength and so adapted as to serve, when built,

opinion of the Court of Appeals, said: "If, in the lawful use of one's property, injury is occasioned to an adjacent owner, which the exercise of due care could not have prevented, there is no remedy."

700. An addition made to a party-wall by one of two adjoining owners on his own land for the purpose of thickening and strengthening it is not any part of the party-wall. The other adjoining owner may use the wall so strengthened in increasing the height of his building; and if he does not project the timbers of his building beyond that portion of the wall standing on his land, he is not liable for any part of the cost of strengthening the wall, and cannot be restrained from making such use of the strengthened wall. Such owner will, of course, get a benefit from the additions made by the other owner for the purpose of strengthening the wall; but this does not create a liability on his part to pay any part of the cost of strengthening the wall, nor take away his right to use the party-wall so strengthened.¹

701. An easement in a party-wall built entirely upon land of another may be such as to entitle the owner of the easement to build the wall higher. Thus an agreement whereby one purchased the right "to place joists to the depth of four inches and to otherwise build into and against" the wall of an adjoining building belonging to another, "and to otherwise use the same as a party or division wall," includes the right to increase the height of said wall.² "The special mention of the right to place joists to the depth of four inches, and to otherwise build into and against the wall, cannot exclude or limit the other and important provision. In contracting for the use of the wall as a party-wall it was perfectly competent for them to determine the depth to which the joists

the purposes of the defendant's new building, without detriment to the enjoyment by the plaintiff of his premises. The plaintiff's agreement bound him to construct a party-wall foundation sufficient for the purposes of a three-story building, and he may not complain if the wall is carried up to subserve such a purpose. Had the defendants exceeded the height of three stories, it can then be seen that they might have become insurers of the

safety of the wall; for they would have been without the protection of the party-wall agreement and they would have been undertaking to do a thing, which would possibly, if not probably, be hazardous, in view of the limitations as to strength under which the foundation wall was built."

¹ Walker v. Stetson, 162 Mass. 86, 33 N. E. Rep. 18.

² Dorsey v. Habersack (Md.), 35 Atl. Rep. 96, 97, per Boyd, J.

should be inserted, and, although unnecessary to state it, as it would have been covered by the agreement for the use of the party-wall, the provision to otherwise build into and against the wall does not exclude the general provision."

A decision which seems to be at variance with other authorities was recently rendered in Nebraska, where it was held that an agreement for the construction of a party-wall to the height of three stories on the land of one of two adjoining owners does not justify the assumption that the other may of his own motion and for his own sole benefit extend such wall upwards still another story in hostility to the wishes of the party on whose land the wall was built.¹

702. The party who has acquired a right by prescription in a wall built wholly on his neighbor's land cannot complain that the owner of the wall has built it up higher and has placed windows therein, inasmuch as the right is limited to the use enjoyed during the period of prescription. If the easement so enjoyed was solely for the support of the adjoining building, such support is the extent of the right acquired. The wall being the property of another standing wholly on his own land, there is no reason why he could not strengthen it, add to its height, and open windows in the addition, if he chose to do so. The owner of the easement has no rights in any part of the new wall, which is above the height of the old, and which is not required for the support of his building as it stood during the period of prescription. His right is to maintain his building as it had been for twenty years or more, and therefore, if in rebuilding the new wall his house was injured by cutting the timbers, the owner of the wall is responsible, although such cutting was rendered necessary by the straightening of the wall. The owner of the easement has the full right to maintain it to the extent of the ancient user, but to this extent only.²

703. In case one party strengthens the party-wall and builds it higher, the other may use this higher wall without paying for the same if there is no stipulation or agreement in any form that

¹ Calmelet v. Sichel, 48 Neb. 505, 67 Atl. Rep. 278. And see Weston v. N. W. Rep. 467. Arnold, L. R. 8 Ch. 1084. See, how-

² Barry v. Edlavitch (Md.), 35 Atl. Rep. 170. See also Putzel v. Drover's & Mech. Nat. Bank, 78 Md. 349, 360, 28 67 N. W. Rep. 467.

such payment should be made.¹ No contract can be implied to pay for the use of a wall standing upon one's own land. There are decisions, however, to the effect that one who builds a party-wall higher for his own convenience is entitled to contribution from the other owner, who, without any agreement in relation to the wall, uses the additions to the extent of one half of the value of the additions at the time they are so used.²

When one owner builds the party-wall higher under an agreement that the other owner may use the additional height by paying what is just and equitable therefor, such addition becomes a party-wall in the strictest sense with the usual easement of support.³

704. An addition in height to a party-wall is not necessarily a party-wall. The owner of a building having a wall on the boundary line between his land and other adjoining land, by a deed poll authorized the adjoining owner to build a party-wall under the existing wall to a height a little above the first floor of such building, and it was provided that either party could add to the wall in height, doing work from his own side if the other side was built upon. The adjoining owner accordingly built a party-wall to the height specified under the existing wall. He was erecting a large building, and needed a much higher wall on the line. To have carried the party-wall higher would have necessitated widening the foundation, which could not be done on the other owner's side of the division line, because of a passageway there, upon which he had no right to encroach. It also would have required the removal of the wall just mentioned, under which the party-wall had been built. The defendant, therefore, built on top of the existing wall. A suit was brought by the owner of such wall to compel the adjoining owner to remove the part built upon the plaintiff's wall. The main question was whether the defendant was bound to build such wall fit for use as a party-wall. Mr. Justice Holmes, delivering the judgment that the suit could not be maintained, said: "The words contemplate that existing walls, such as the plaintiff's, may be left standing; and, as we have said, this would have had to be removed for a continuous party-wall. The addition to the thickness required if the party-wall was to be carried higher was not only impossible,

¹ Allen v. Evans, 161 Mass. 485, 37 N. E. Rep. 571.

³ Field v. Leiter, 118 Ill. 17, 6 N. E. Rep. 877.

² Sanders v. Martin, 2 Lea, 213, 31 Am. Rep. 598.

on the plaintiff's side, but was expressly provided against by the deed. At the same time the plaintiff, when she executed the instrument, knew that the defendant was about to erect a large building, which, of course, would need high walls. Under these circumstances, while it may be admitted that the deed has some language looking to the possibility of the party-wall being raised higher, it seems to us reasonable to construe it also permitting the party who finds one-half of the space occupied to build a separate wall to suit himself, without further restrictions than those expressed as to materials and workmanship, and those contained in the building law as to external walls and not party-walls."¹

705. One owner of a party-wall has the right to lower the foundation so as to give him a sub-basement.² He may also deepen the foundation in order to strengthen the wall sufficiently to bear the weight of a higher building.³

VII. *Removing and Rebuilding.*

706. The mutual easement in a party-wall continues only so long as the wall remains safe and suitable for use. When the wall becomes unfit for its purpose either from age or accident, the easement ceases. "The object of the wall is to support the houses of which it forms a part, and, so long as it stands and answers that purpose, it cannot be changed, or removed, or rebuilt, without an agreement therefor. But when that state of affairs occurs which renders the party-wall useless, whether from fire or flood, the ravages of time or accident, though it may still stand, 'the mutual easements,' as Denio, C. J., said, 'have become inapplicable, and each proprietor may build as he pleases on his own land without any obligation to accommodate the other.' So long as the wall stands fit and suitable for the original purpose for which it was erected, the right of support continues. But when, after the destruction of the buildings it remains or stands dilapidated, or unless — unfit and unsafe to be used as a party-wall — it does not stand, in legal contemplation, as a party-wall."⁴

¹ Palmer v. Evangelical Bap., Benev. Soc., 166 Mass. 143, 43 N. E. Rep. 1028. See § 633.

² Standard Bank v. Stokes, 9 Ch. Div. 68.

³ Eno v. Del Vecchio, 4 Duer, 53.

⁴ Odd Fellows' Asso. v. Hegele, 24 Oreg. 16, 23, 32 Pac. Rep. 679, per Lord, C. J. And see Antomarchi v. Russell, 63 Ala. 356, 35 Am. Rep. 40; Glenn v. Davis, 35 Md. 208, 6 Am. Rep. 389; Moore v. Shoemaker (D. C.), 25 Wash. L. Rep. 72, 29 Chic. L. N. 207.

A party-wall agreement which provides that the rights of the parties shall continue "so long as the wall shall stand" means so long as the wall shall continue suitable for its purpose, and not so long as any fragment of the wall shall remain.¹ The mutual easements created by the agreement continue so long as the wall remains suitable for use, and no longer.

If the wall was erected without any agreement, but, for instance, was erected by the owner of two buildings, and it became a party-wall upon a sale of the buildings to different persons, or by long-continued use and acquiescence, the easement of lateral support is not to be construed as a perpetual easement, as of a party-wall, but when either of the buildings is torn down or destroyed the land on which the building stood is not subject to an easement for the support of a wall for other or different buildings requiring greater or more extensive support. If the building is not at once restored, the right of mutual support will cease, and the parties may then assert their title to the division line.²

707. When a party-wall has become old, ruinous and incapable of being repaired, either party may pull it down and rebuild the wall, and according to Chancellor Kent, the other is liable to contribution towards the expense of rebuilding.³

The original agreement has reference solely to the wall to be constructed under it. If the wall is destroyed the builder of the wall is under no obligation to rebuild it at his own expense. If it is rebuilt, it is said that the owner of the adjoining lot should contribute to the expense or should enter into a new agreement.⁴

¹Odd Fellows' Asso. v. Hegele, 24 Oreg. 16, 32 Pac. Rep. 679. And see Hoffman v. Kuhn, 57 Miss. 746, 34 Am. Rep. 491.

²Moore v. Shoemaker (D. C.), 25 Wash. L. Rep. 72, 29 Chic. L. N. 207; Heartt v. Kruger, 24 J. & S. 382, affirmed 121 N. Y. 386, 24 N. E. Rep. 841; Sherred v. Cisco, 4 Sandf. 480.

³Campbell v. Mesier, 4 Johns. Ch. 334, 341, 8 Am. Dec. 570, Chancellor Kent, delivering the judgment, said: "The houses on each side of the lot were old and almost untenable; and it would be the height of injustice to deny to the plaintiff the right of pulling down such a common wall, and of

erecting a new one suitable to the value of the lot, in the most crowded part of a commercial city. It would be equally unjust to oblige him to do it at his exclusive expense, when the lot of the defendant was equally benefited by the erection, and much enhanced in value. Persons who own lots in the midst of a populous city, must, and ought to submit to the law of vicinage, which applies to such cases, and flows from such relations." Chancellor Kent's view in regard to the obligation to contribute toward rebuilding has been followed in Huck v. Flentye, 80 Ill. 258.

⁴Huck v. Flentye, 80 Ill. 258.

708. It would seem, however, that there is no right to a contribution towards rebuilding such wall, unless by the agreement of the parties there is an obligation to rebuild.¹ When a party-wall has become so old and impaired as to require rebuilding from the foundation the mutual easements of the owners cease and each proprietor may build as he pleases on his own land without any obligation to accommodate the other. The parties are regarded as remitted to their original rights in the same manner as they are when the party-wall has been destroyed by fire. The right to rebuild the wall, half on the line of each owner, and to claim contribution for the expense, as declared by Chancellor Kent, was doubted by Chief Justice Denio, who said: "Circumstances may have materially changed since the adjoining proprietors were content with such walls as would have supported two adjoining dwellings. If the right of mutual support continues, by means of the original arrangement, or by prescription, it is for just such an easement as was originally conceded, or which has been established by long enjoyment. But in the changing condition of our cities and villages it must often happen, as it did actually happen in this case, that edifices of different dimensions and an entirely different character would be required. And it might happen, too, that the views of one of the proprietors, as to the value and extent of the new buildings, would essentially differ from those of the other; and the division wall, which would suit one of them, would be inapplicable to the objects of the other."²

Under a statute relating to the tearing down and replacing of an existing party-wall, and providing that the adjoining owner shall not use the said wall by building into or against, or by using it "for any new building," until he shall have paid a portion of the cost, he is not rendered liable to pay until he begins to make a new use of the wall, and the mere replacing of his beams in the wall as they had been in the old wall is not such a use, but a continuance of the old use.³

¹ *Antomarchi v. Russell*, 63 Ala. 356, 35 Am. Rep. 40. Where the wall was built at the joint expense of adjacent owners without any agreement. *Orman v. Day*, 5 Fla. 385; *List v. Hornbrook*, 2 W. Va. 340; *Reynolds v. Fargo*, 1 *Sheld.* 531.

² *Partridge v. Gilbert*, 15 N. Y. 601, 615, 69 Am. Dec. 632. This point was not, however, necessary for the decision of the case before the court.

³ *Hoffstot v. Voight*, 146 Pa. St. 632, 23 *Atl. Rep.* 351.

709. When a party-wall is destroyed by fire or otherwise, or has become ruinous, there is no obligation resting upon either owner of the adjoining lots to rebuild it or to unite in rebuilding another party-wall. "It is not disputed that each proprietor remained the owner in severalty of the ground on which half the wall rested, and of course each owned in severalty one half of the wall. Neither party had a right to pull down the wall without the other's consent, and to that extent the agreement upon which it was erected controlled the exclusive dominion which each would otherwise have had over the half of the wall, as well as over the soil on which it stood. * * * The parties being confessedly restrained from destroying the wall without mutual consent, how is it when the wall has been destroyed by the elements? The lands on each side are vacant. The agreement upon which the party-wall was built related to that wall only. There was no agreement to build a second wall, or to build houses a second time, in the event that the original wall, and the houses which it supported, should be destroyed. Neither party, perhaps, thought of such an event. If they had, it by no means follows they would at that time have stipulated for a second joint-wall."¹

710. One having an easement in a wall which forms a side of his building abandons and extinguishes the easement by erecting a new building on a different foundation after the destruction of the wall and building by fire. Certainly, as against the purchaser of the adjoining building in the wall of which the easement is claimed, who has bought and built on the old lines without notice of any claim of an easement in the old foundation, the former owner of the easement is estopped to claim an easement in the old wall.²

¹ *Sherred v. Cisco*, 4 Sandf. 480, 487, per Sandford, J. And see *Heartt v. Kruger*, 121 N. Y. 386, 24 N. E. Rep. 841, 9 L. R. A. 135; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Antomarchi v. Russell*, 63 Ala. 356, 35 Am. Rep. 40, following and approving *Sherrod v. Cisco*, *supra*; *Huck v. Flentye*, 80 Ill. 258; *Hieatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280; *List v. Hornbrook*, 2 W. Va. 340; *Orman v. Day*, 5 Fla. 385; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Pierce*

v. Dyer, 109 Mass. 374, 377, 12 Am. Rep. 716, Colt, J., saying: "When thus destroyed, it is fair to presume that the parties intend, in the absence of any agreement, that the easement shall end with the necessity which created it. There can be by implication no mutual easement of perpetual support, applicable to future structures."

² *Duncan v. Rodecker*, 90 Wis. 1, 62 N. W. Rep. 533.

711. Either owner may tear down and rebuild a party-wall even before it has become ruinous or incapable of further answering the purpose for which it was erected, in order to improve his own property. He may underpin the foundation, sink it deeper, and increase, within the limits of his own lot, the thickness, length or height of the party-wall, if he can do so without injury to the building on the adjoining lot. And to avoid causing such injury, he may shore up and support the original party-wall a reasonable time to excavate and place a new underpinning beneath it. He must do this without injury to his neighbor's building.¹ One owner has no right to underpin the party-wall, either partially or wholly, unless he can do so without injury to the building of the adjoining owner. The party rebuilding the wall is liable for any injury resulting from his mode of doing the work, to the adjoining owner, and it is immaterial whether the latter is regarded as having a several interest in the half of the wall which is next to his house, or whether he and the other owner are regarded as tenants in common of the whole wall.²

If one owner, without the consent of the other, removes an ancient party-wall while it is sound and suitable for the purpose for which it was erected and erects a new party-wall, he is liable to his neighbor for any loss of rent occasioned thereby, and for the expense of all repairs made necessary by the removal of the old and the erection of the new wall.³

An owner rebuilding a party-wall is not liable to his neighbor for the value of property stolen by reason of its being exposed to theft by his tearing down the party-wall; for he had a legal right to do this, and it was the duty of his neighbor to take care of his goods.⁴

712. One owner of the party-wall has no right to tear it down so long as it is safe and sufficient for the use of the other adjoining owner. The right to remove a party-wall exists only in cases where either the party-wall itself has become useless or has become old and ruinous, or either building has become dilapidated or unsafe and its removal would endanger the entire wall. If one

¹ *Cubitt v. Porter*, 8 B. & C. 257; *Eno v. Del Vecchio*, 4 Duer, 53; *Webster v. Stevens*, 5 Duer, 553.

² *Bradbee v. Christ's Hospital*, 4 Mann. & G. 714, 761.

³ *Potter v. White*, 6 Bosw. 644; *Eno v. Del Vecchio*, 4 Duer, 53, 6 Duer, 17; *Schile v. Brokhahus*, 80 N. Y. 614.

⁴ *Gettwerth v. Hedden*, 30 La Ann. Pt. 1, 30.

owner, desiring to erect a new building for which the existing party-wall would be insufficient under the building laws, though the wall is sound and sufficient for the use of the other owner, proceeds to take down the wall without consent, he may be restrained by injunction.¹

If the building on one side of the party-wall is destroyed by fire, but the wall remains standing and is sufficient for the support of the building on the other side, the owner of this building cannot be disturbed in his easement.²

But if the strengthening of a party-wall be undertaken with the consent of the owner of the adjoining building, and the work be prosecuted with care and skill, no liability arises for damages necessarily occasioned by the work. The license given to do the work is a sufficient answer to a claim for damages.³

713. A joint owner of a party-wall may remove it, and erect a new one in its place; but he is under the obligation to do this within a reasonable time, and to reimburse the other owner of the wall for any necessary expenses he has incurred in protecting his property during the change.⁴ If the party so rebuilding occupies no unnecessary time in completing the work, and uses the proper care and skill in its execution, he is not responsible to the owner or tenant of the adjoining building for damages resulting from exposure to the weather or from loss of business or inability to lease the building or any part of it.⁵

¹ Partridge v. Lyon, 67 Hun, 29, 21 N. Y. Supp. 848; Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632; Maxwell v. East River Bank, 3 Bosw. 124, 146.

² Brondage v. Warner, 2 Hill, 145.

³ Waller v. Lasher, 37 Ill. App. 609.

⁴ Standard Bank v. Stokes, 9 Ch. D. 68; Putzel v. Drovers & Mechanics' Nat. Bank, 78 Md. 349, 28 Atl. Rep. 276, 22 L. R. A. 632; Brown v. Werner, 40 Md. 15; Gettwerth v. Hedden, 30 La. Ann. Pt. 1, 30.

⁵ Partridge v. Gilbert, 15 N. Y. 601, 616, 69 Am. Dec. 632. This was an action by the tenants of the adjoining building for damages suffered by the taking down and rebuilding the division wall. Chief Justice Denio, delivering the

judgment to the effect stated in the text, said: "It was a benefit and not an injury to the plaintiffs that the defendants carefully took down the wall instead of suffering it to fall by its own weight. They gave them timely notice to provide for the security of their property. Although they have suffered damages, it is not owing to any wrongful act of the defendants, but to the misfortune of the plaintiffs in occupying a building which, if not actually untenable, adjoined a wall and another building which were so far dilapidated that they required to be taken down. If the mutual easement for support had ceased, the plaintiffs could not call upon the defendants to erect another wall. Their resort, if they had any,

714. But one rebuilding a party-wall is not bound to reimburse his neighbor for unnecessary expenditures made in the mistaken belief that they were necessary to save his property from injury. The owner of a building, for the purpose of erecting a much larger building, tore down his old building, leaving the party-wall in a ragged condition, beam-holes appearing in some places, and the ends of beams protruding in others, and the tin roofing being torn up where it had joined defendant's building. The adjoining owner, having received notice from the bureau of buildings to rebuild the wall and beam-holes, where required, and make the roof water-tight, without any notice to the owner who had taken down the adjoining building, made permanent repairs upon the party-wall, and brought suit against the other owner for the expense thus incurred. It was held, however, that inasmuch as the defendant intended, in rebuilding, to erect a strengthening wall immediately against such party-wall, and thus cover up and protect such wall, he was not liable for the cost of permanent repairs; and want of knowledge on plaintiff's part of defendant's intention did not affect the case, he having made no effort to discover defendant's intentions, and not having notified him to protect the wall.¹

715. One party taking down an unsafe and ruinous party-wall without the consent of his neighbor is not liable to him for damages if he exercises reasonable care that his neighbor suffers no unnecessary harm; but the support which his neighbor's building needs in place of the wall the neighbor must himself provide.² "The principle is, that the owner of each building supported by a common wall is entitled to have it supported by such wall so long as it is in a condition to uphold it, but when it becomes ruinous or

would be against their own landlord. But the defendants did provide a new wall, which, when completed, furnished the support of which the plaintiffs had been temporarily deprived. If the right continued for each of the proprietors to call upon the other to join in building a new wall, still the plaintiffs have no ground for complaint; for the defendants have committed no breach of their obligation in that respect. Either with or without the co-operation of the plaintiffs' landlord, the defendants have erected a new wall, as

beneficial at least for the plaintiffs' purposes as the old one was in its best estate."

¹ *Berry v. Todd*, 14 Daly, 450.

² *Schile v. Brokhahus*, 80 N. Y. 614; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Maypole v. Forsyth*, 44 Ill. App. 494, per Gray, J. "The whole duty of the party taking down the wall is negative to do no unnecessary harm; not affirmative—to prevent consequences of the exercise of his right." *Crawshaw v. Sumner*, 56 Mo. 517.

dangerous, so that it endangers the safety of the property or life of the occupants, neither party is obliged to wait till the building falls down, but may proceed to rebuild, and the adjacent proprietor, who refuses or neglects to join in the expense, has no right of action for the damage or inconvenience which is occasioned by such repairs or rebuilding of the wall. This does not justify carelessness or negligence in doing the work.”¹

The right of an owner of a lot or building to take down or change any foundation wall or other part thereof, without being answerable for the consequent injury to his neighbor's house or building, is subject to the qualification that he must exercise due care and skill, and that he will be liable in damages if the injury to his neighbor is occasioned by the negligent and unskilful manner in which the work is performed.²

Neither party can recover from the other for any act of negligence which was a mere omission. Therefore, one cannot recover from the other for a fall of the party-wall due to the failure of the latter to secure it after a fire upon his premises.³

716. Where one or two owners of adjoining estates tears down a party-wall in disregard of the rights of his neighbor, claiming that it stands entirely upon his own land, intending to erect a new wall for himself, without giving his neighbor any benefit from it as a party-wall, he becomes a trespasser and is liable for the damages resulting. A loss of profits consequent upon such trespass may properly be allowed as part of the damages. Where the business has been partially interrupted because of such trespass it is competent to prove, upon the question of damages, the amount of business previously done and how much less the business was during the interruption than during the corresponding time the previous year; and the profits upon the business; and if the falling off of business is shown to have been in consequence of the wrongful tearing down of the party-wall, the loss of profits thus established is a proper item of damages.⁴

717. An adjacent proprietor has no right, in building a new wall, to cut away, disturb or weaken a part of the foundation of his neighbor's wall or to cause the projections of his wall to rest on

¹ *Crawshaw v. Sumner*, 56 Mo. 517, 522, per Napton, J.

³ *Mickel v. York*, 66 Ill. App. 464.

⁴ *Schile v. Brokhahus*, 80 N. Y. 614.

² *Leavenworth Lodge v. Byers*, 54 Kans. 323, 38 Pac. Rep. 261.

that of his neighbor, and if he does so and causes injury or damage he is liable to his neighbor in damages.¹

If one owner of a party-wall takes down the part of the wall which is upon his own land, using proper care to prevent injury to the part of the wall standing upon his neighbor's land, after having given him notice of his intention, and this wall falls notwithstanding such care, he is not liable to his neighbor for the injury.²

718. An adjoining owner has no right to destroy the character of the structure as a party-wall. He has therefore no right to cut away a portion of the face of an ancient solid party-wall and erect a new wall upon his own land at a distance of two inches from that portion of the ancient wall which is left standing, though he connects this with the new wall by occasional projecting bricks and ties. His neighbor had an easement of support in a solid party-wall.³

If a wall stands entirely upon the land of one of two adjoining owners, the other may be enjoined from interfering with such wall in the absence of any agreement between the parties. If, however, such wall overhangs the land of the adjoining owner so as to prevent him from erecting a building with a perpendicular side wall upon his own land, he may cut into such wall for the purpose of erecting the wall on his land. Whatever may have been the cause of the defect in the wall, it will not be allowed to interfere with the rights of the adjacent landowner. But in cutting into the wall to remedy the encroachment he must use proper care not to render the wall insecure.⁴

¹ *Bonquois v. Monteleone*, 47 La. Ann. 814, 17 So. Rep. 305; *Pierce v. Musson*, 17 La. 389; *Eno v. Del Vecchio*, 6 Duer, 17; *Berry v. Todd*, 14 Daly, 450; *Briggs v. Klosse*, 5 Ind. App. 129, 31 N. E. Rep. 208; *Covington v. Geyler*, 93 Ky. 275, 19 S. W. Rep. 741.

² *Hieatt v. Morris*, 10 Ohio St. 509, 78 Am. Dec. 280.

³ *Phillips v. Bordman*, 4 Allen, 147, 149. "The right which the plaintiffs had was an easement of support in a solid party-wall. The acts of the defendant tended to destroy this right. If he could cut off the old wall in part, and erect a new one separate from it

at a distance of two inches, and connected with it only by occasional supports or ties, he might in like manner erect his new wall at a distance of two feet or two yards, and connect it with the residue of the old wall by ties of stone or wood. After such an alteration as that made by the defendant, the plaintiff's estate might be as strong and well supported as before, but it would cease to be upheld or sustained by the ancient party-wall—a solid structure—such as the plaintiffs had from time immemorial enjoyed." Per *Bigelow, C. J.*

⁴ *Lyle v. Little*, 83 Hun, 532, 33 N. Y. Supp. 8.

719. Where one such owner contracts with an independent contractor to make a change in a party-wall, and in a lawful, proper and usual way the work is not in itself dangerous or extraordinary, and does not subject the existing wall to overweight, he is not liable for the damage incident to the falling of the wall through some accident, or for any casual act of negligence of such contractor.¹ The party-wall contract in this case contemplated a wall for a three-story building, but the party who erected the wall built it only two stories high; and it was held that the carrying up the wall by the other party did not make him an insurer against injuries which resulted to his neighbor's property through the negligence of his contractor, and did not render him liable for the falling of the wall without any negligence of his own. The party who built the wall was under obligation to construct a wall for a three-story building, and he cannot complain that the other party carries up the wall to subserve such purpose. Had the latter exceeded the height of three stories, he might be regarded as an insurer of the safety of the wall, for he would, in that case, be without the protection of the party-wall agreement, and he would have been undertaking to do a thing which would possibly, if not probably, be hazardous in view of the limitation as to the strength under which the foundation wall was built.²

720. There is an absolute duty imposed upon the owner who makes changes in the wall for his own purposes to see that his neighbor's property is not injured, and whether he or his contractor exercises care and skill or not, he is absolutely responsible for any injury that results from such change.³ One building a party-wall higher, or making changes in it to accommodate his own building, necessarily enters upon the premises of his neighbor. The necessary and probable effect of his work is to imperil the safety of the adjoining building, and he cannot in such a case, by employing an independent contractor, relieve himself of his duty of seeing that no injury comes to his neighbor's property. Though one of two adjoining owners has the right to pull down a party-wall

¹ *Negus v. Becker*, 143 N. Y. 303, 38 J. E. Rep. 290, 23 L. R. A. 667, reversing 22 N. Y. Supp. 986, and distinguishing *Brooks v. Curtis*, 50 N. Y. 639. And see *Covington v. Geyler*, 93 Ky. 275, 19 S. W. Rep. 741. J. And see *Keller v. Abrahams*, 13 Daly, 188.

² *Bower v. Peate*, 1 Q. B. D. 321; *Percival v. Hughes*, 9 Q. B. D. 441; *Fowler v. Saks*, 18 D. C. 570, 7 L. R. A. 649; *Dorrity v. Rapp*, 72 N. Y. 307.

³ *Negus v. Becker*, *supra*, per Gray,

or to make changes in it for his own convenience, if he does so he is absolutely liable to the other for any injury resulting therefrom. The measure of damages is the cost of restoring the property of his neighbor to the condition in which it was before the injury.¹

The rule of liability above stated is more strict than that applied in the cases of easements for support,² and is more strict than some courts would apply in cases of party-walls. In a recent case in Connecticut, in which the above cases were referred to, the court remarked: "It is perhaps open to some doubt whether the rule of liability expressed in these cases would be applied to the same extent in this State. We have no occasion now to discuss that question. It would not be applied here or elsewhere, except in a case where a strict party-wall was shown to exist."³

721. The owner of land who builds or rebuilds a party-wall is liable to the owner of the adjoining land for an injury to his property occasioned by the falling of the wall resulting from its defective and unsafe condition, whether such condition was owing to the negligence of the owner or to that of the mason who built the wall. The mason who contracted to do the work would, however, be responsible for any injury caused by his negligence in a matter collateral to the contract, such, for instance, as depositing materials, handling tools or constructing temporary safeguards during the work.⁴ But the party who builds the wall is not liable to the other for the injury done his property in an action of contract. The duty of the party building to exercise due care in building the wall is not regulated by the agreement, and does not rest in contract; it is governed by the common law, and redress for the injury must be sought in action of tort.⁵

722. But one who builds a party-wall is not bound to make it strong enough to support any kind of a building which the adjoining proprietor may erect; and if such adjoining proprietor erects a

¹ Schile v. Brokhaus, 80 N. Y. 614; Brooks v. Curtis, 50 N. Y. 639, 645; Eno v. Del Vecchio, 6 Duer, 17; Briggs v. Klosse, 5 Ind. App. 129, 31 N. E. Rep. 208; Fowler v. Saks, 18 D. C. 570, 7 L. R. A. 649.

² See §§ 620-631.

³ Whiting v. Gaylord, 66 Conn. 337, 344, 34 Atl. Rep. 85.

⁴ Gorham v. Gross, 125 Mass. 232, 28

Am. Rep. 234, per Gray, C. J.; Glover v. Mersman, 4 Mo. App. 90; Dillon v. Hunt, 11 Mo. App. 246; Earl v. Beadleston, 10 J. & S. 294; Brown v. Werner, 40 Md. 15; Briggs v. Klosse, 5 Ind. App. 129, 31 N. E. Rep. 208; Sessengut v. Posey, 67 Ind. 408, 33 Am. Rep. 98.

⁵ Gorham v. Gross, 117 Mass. 442, per Gray, C. J.

building too heavy for the wall, and his building in consequence falls, he cannot recover damages of the builder of the wall. It is the duty of the one erecting a party-wall to make it of sufficient strength only to support another building similar to the one of which it was made a part, unless the agreement between the parties specifies a different kind of wall.¹ Neither can the owner of a party-wall be compelled to take it down at his own expense because it is not of sufficient strength for a building which his neighbor desires to erect on his adjoining land.²

723. Under a statute making it the duty of one digging to a depth of more than ten feet below the curb line, to protect any party or other wall on the adjoining land and at his own expense preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before the excavations were commenced, the duty and liability of such party does not cease at the completion of the excavation. If, by reason of the great weight of the structure he builds, the wall of the adjoining building settles and cracks, he is liable for the injury done; for in such case he has not supported the wall by proper foundations and made it as stable as it was before.³

Under this statute one proposing to excavate for the purpose of building, having obtained a parol license from the occupant of adjoining premises as required by the consolidation act, and having shored up a party-wall and removed the foundation thereof, he may, notwithstanding a revocation of the license, proceed and build up a new foundation wall, so as to sustain the party-wall, and for that purpose he has the right to enter upon so much of the adjoining premises as is necessary and until this work is done, if he proceed with reasonable dispatch and does it in a good workmanlike manner, with as little injury and inconvenience as possible to the adjoining occupant, he cannot be regarded as a trespasser, nor can he be required to remove the supports to the wall.⁴ The parol license, having been acted upon and expense incurred in reliance of it, cannot be revoked.

The statute does not apply to the foundations of a stoop, and

¹ Gilbert v. Woodruff, 40 Iowa, 320; Cohen v. Simmons, 21 N. Y. Supp. 385, 66 Hun, 634; Laws of New York
Cutter v. Williams, 3 Allen, 196.

² Ferguson v. Fallons, 2 Phila. 168. 1882, ch. 410 (Consolidation Act), § 474.

³ Bernheimer v. Kilpatrick, 53 Hun, 316, 6 N. Y. Supp. 858. And see ⁴ Ketchum v. Newman, 116 N. Y. 422, 22 N. E. Rep. 1052.

therefore the liability for injuries to the stoop by such digging is to be determined by the rules of the common law, which do not make one digging with care on his own land liable for the fall of structures upon the adjoining land.¹

724. An injunction is the proper remedy against making or cutting openings in a party-wall, for the trespass is of a continuing nature, whose constant recurrence renders the remedy at law inadequate by reason of the fact that each disturbance of plaintiff's easement in the wall would form the basis of a fresh suit. Besides, the trespass or the disturbance of plaintiff's easement in the party-wall would, if permitted to continue, ripen into an easement, and this itself is ground also for equitable relief.²

Equity will not compel the removal of an extension of a party-wall, on the ground that it was a use of the party-wall not contemplated by the agreement, where plaintiff made no objection until the extension was completed; but in such case he would be left to his remedy at law.³

Where the first builder in erecting a party-wall has used iron rods and bolts to secure the same, which project on his neighbor's property, he will not be compelled by a court of equity to remove them if the adjoining owner has been tardy in asserting his rights. The latter's remedy would be an action at law for damages.⁴

¹ *Berry v. Todd*, 14 Daly, 450; *Laws* 1882, ch. 410, § 474.

² *Harber v. Evans*, 101 Mo. 661 14 S. W. Rep. 750; *Graves v. Smith*, 87 Ala. 450, 6 So. Rep. 308; *St. John v. Sweeney*, 59 How. 175; *Vollmer's App.*, 61 Pa. St. 118; *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627. In *Pierce v. Lemon*, 2 Houst. 519, the plaintiff and the defendant were the owners of adjoining lots in the city of Wilmington, and the latter built a party or division-wall of a brick stable,

with three windows therein, commanding a view of plaintiff's back yard, and it was held that an action on the case could not be maintained; that the only remedy plaintiff had was to build blinds or other erections in front of the obnoxious openings, and thus cut off the defendant's view.

³ *Sebald v. Mulholland*, 6 Misc. Rep. 349, 26 N. Y. Supp. 913.

⁴ *Walsh v. Luburg*, 10 Pa. Co. Ct. 641; *Mayer's Appeal*, 73 Pa. St. 164.

CHAPTER XVI.

WATER.

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I. *Flowing Streams and Surface Water Distinguished.*¹

725. The right of a riparian owner to have the water of the stream flow in its natural state in some respects resembles an easement, "but it is not an easement properly so-called," says Mr. Leake in his work on Land Laws, "nor is it treated as an easement in law; it is an ordinary incident of riparian property, and differs from an easement in being appurtenant by nature without a special title of grant or prescription. * * * Also a right acquired by a riparian owner to divert the water of a natural stream through his own land, though sometimes spoken of as an easement, is not properly so called. It is an act of ownership; and so far as it may be an appropriation of the water, it takes that which was not before the subject of property; it may permanently diminish the stream to the lower tenements, but it does not otherwise render them servient to any use or interference of the upper owner."²

But as regards all the natural rights as to the flow and use of water it may be said that they are treated as easements by all the leading writers upon the subject—Gale, Goddard and Washburn—and they are quite generally spoken of as easements by the judges. Thus

¹ It is to be kept in mind that this chapter is not intended as a treatise on water-courses or the law of waters in general, but rather as a condensed statement of that part of this law which is concerned with water rights that are commonly classed as easements. For a general treatise on the Law of Waters, reference may be had to Mr. Gould's excellent work on this subject.

² Pt. III. p. 226, citing *Dickinson v. Grand Junc. Canal*, 7 Ex. 282; *Mason v. Shrewsbury R'y*, L. R. 6 Q. B. 578, per Cockburn, C. J.

the Supreme Court of California, in a recent case relating to the right of one to have the surface water flow from his land over the lower land of the adjoining owner, asked the question whether the upper owner had an easement in the land of the lower owner for the flow of the water; and after giving the usual definition of an ordinary easement, say: "Easements are of two kinds, similar to one another in many respects, but differing in many particulars. To the first class belong those easements created by act of man, and to the second, those which are given by the law to every owner of land. This latter class is given by law, because without them there would be no security in the enjoyment of land by its owner. Without them a neighbor might deprive a landowner of the benefits derivable from things which in the course of nature have been provided for the common good of all, and which the law wisely provides shall not be wrested from one by the act of another. These easements are said to be inherent in the land *ex jure naturale*, and are often termed natural rights. A careful review of the adjudicated cases will, it is believed, show that a good deal of obscurity has been thrown around many questions connected with the subject under consideration, by a failure to observe the line of demarcation between these two classes of easements. As it is with the latter class that we have exclusively to do in the present case, we must eliminate from consideration such rules of construction as apply exclusively to easements founded upon grant or prescription."¹

726. The rules of law relating to the diversion and use of surface water are essentially different from those which apply to streams flowing in channels between well-defined banks.² A riparian proprietor has a limited right to use or divert the running water of a stream, but a landowner upon whose land surface water falls or collects has an absolute right to the water. He may use or divert the whole of it or may abandon it as he pleases.³ The owner of the higher land has an unqualified right to appropriate all of the surface water to his own use. This right is based upon his dominion over the soil which extends indefinitely upwards and downwards. He is

¹ Gray v. McWilliams, 98 Cal. 157, 161, per Searls, C.

² Flagg v. Worcester, 13 Gray, 601.

³ Broadbent v. Ramsbotham, 11 Exch. 602; Ennor v. Barwell, 2 Giff. 410; Livingston v. McDonald, 21

Iowa, 160, 89 Am. Dec. 563; Gibbs v. Williams, 25 Kans. 214, 37 Am. Rep.

241; Jones v. Wabash, St. L. & P. R. Co., 18 Mo. App. 251; Johnson v. Chicago, St. P., M. & O. R. Co., 80 Wis. 641, 14 L. R. A. 495.

not liable to an action by the lower proprietor for so using the surface water or for so draining it as to prevent any portion of such water from reaching the land of the latter.¹

Accordingly it is important at the outset to distinguish between streams of water flowing in regular channels and surface water which has no channel.

727. To establish the existence of a water-course, or a regular flowing stream of water, it must appear that the water flows in a channel, consisting of a bed of the stream and banks.² The channel must be well defined, and the water must flow in a certain direction. It is a water-course though at certain seasons the water is dried up. A freshet, or occasional outburst of water, flowing in no particular channel is not a water-course.

Water supplied by rain and melted snow, although running through a natural depression, but having no definite channel, is nothing more than surface water.³ But when such water com-

¹ Rawstron v. Taylor, 11 Exch. 369; Livingston v. McDonald, 21 Iowa, 160, per Dillon, J.; Wheatley v. Baugh, 25 Pa. St. 528; Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376.

² Williams v. Richards, 23 Ont. 651; Gillett v. Johnson, 30 Conn. 180; Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. Rep. 239, 22 L. R. A. 45; Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376; Joliet & C. R. Co. v. Healy, 94 Ill. 416, 421; Mitchell v. Bain, 142 Ind. 604, 42 N. E. Rep. 230; Schlichter v. Phillipy, 67 Ind. 201; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; New York, C. & St. L. R. Co. v. Speelman, 12 Ind. App. 372, 40 N. E. Rep. 541; Robinson v. Shanks, 118 Ind. 125, 20 N. E. Rep. 713; Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563; Chicago, K. & W. R. Co. v. Morrow, 42 Kans. 339, 22 Pac. Rep. 413; Palmer v. Waddell, 22 Kans. 352; Union Pac. R. Co. v. Dyche, 31 Kans. 120, 1 Pac. Rep. 243; Gibbs v. Williams, 25 Kans. 214, 220, 37 Am. Rep. 241; Bangor v. Lansil, 51 Me. 521; Ashley v. Wolcott,

11 Cush. 192; Luther v. Winnisimmet Co., 9 Cush. 171; Jones v. Wabash, St. L. & P. R. Co., 18 Mo. App. 251; Benson v. Chicago & A. R. Co., 78 Mo. 504; Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. Rep. 316; Wagner v. Long Island R. Co., 2 Hun, 633, 5 T. & C. 163; Eulrich v. Richter, 37 Wis. 226; Lessard v. Stram, 62 Wis. 112, 22 N. W. Rep. 284; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473.

³ Ashley v. Wolcott, 11 Cush. 192; Luther v. Winnisimmet Co., 9 Cush. 171; Flagg v. Worcester, 13 Gray, 601; Gray v. Scriber, 58 Mo. App. 173; Kansas v. Swope, 79 Mo. 446; Jones v. Wabash, St. L. & P. R. Co., 18 Mo. App. 251; Benson v. Chicago & Alton R. Co., 78 Mo. 504, 514; McCormick v. Kan. C., St. J. & C. B. R. Co., 57 Mo. 433, 438; Hoyt v. Hudson, 27 Wis. 656, 661, 9 Am. Rep. 473; Lessard v. Stram, 62 Wis. 112; Schaefer v. Marthaler, 34 Minn. 487, 26 N. W. Rep. 726, 57 Am. Rep. 73; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Jean v. Pennsylvania Co., 9 Ind. App. 56; New York, C. & St. L. R. Co. v. Speelman, 12 Ind. App. 372, 40 N. E. Rep.

mences to flow permanently in a well-defined stream with a bed and banks, it is no longer surface water but a water-course.¹

728. A spring becomes a water-course from a point where the water comes to the surface and begins to flow in a channel or bed with such banks or shores as confine the water and cause it to run in a certain direction.² Such water from a spring or any stream does not cease to be a water-course and become mere surface water because after flowing in a channel it spreads over low land and flows for a distance several rods in width without a defined channel and then again forms a definite channel.³ If a water-course is lost in a swamp, it is a water-course still when it emerges therefrom in a defined channel.⁴

The water of a spring after it has acquired a well-defined channel is no longer surface water, but a water-course.⁵ In like manner surface water which has flowed in the same place for such a length of time that it has formed a channel and a well-defined stream, though it is sometimes dry, is a water-course.⁶

Where a township dug a ditch along a natural depression in the soil, down which the surface water from the adjoining lands had been accustomed to flow, and a flowing well was drained into the

541; *Gray v. McWilliams*, 98 Cal. 157, 21 L. R. A. 593; *Alcorn v. Sadler*, 66 Miss. 221, 5 So. Rep. 694; *Bloodgood v. Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 443; *Jeffers v. Jeffers*, 107 N. Y. 650, 14 N. E. Rep. 316; *Kelly v. Dunning*, 39 N. J. Eq. 482; *West v. Taylor*, 16 Oreg. 165, 13 Pac. Rep. 665; *Warmack v. Brownlee*, 84 Ga. 196, 10 S. E. Rep. 738.

¹ *Churchill v. Lauer*, 84 Cal. 233; *Jones v. Hannovan*, 55 Mo. 462; *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38, 7 So. Rep. 212; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. Rep. 53; *Druley v. Adam*, 102 Ill. 177; *Eulrich v. Richter*, 41 Wis. 318; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Kelly v. Dunning*, 39 N. J. Eq. 482.

² *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627; *Chauvet v. Hill*, 93 Cal. 407, 28 Pac. Rep. 1066; *Case v. Hoffman*, 84 Wis. 438, 36 Am. St. Rep. 937; *Mitchell v. Bain*, 142 Ind.

604, 42 N. E. Rep. 230; *White v. Sheldon*, 35 Hun. 193; *Pyle v. Richards*, 17 Neb. 180; *Barnes v. Sabron*, 10 Nev. 217; *Bruening v. Dorr* (Colo.), 47 Pac. Rep. 290.

³ *Gillett v. Johnson*, 30 Conn. 180; *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *Pyle v. Richards*, 17 Neb. 180, 22 N.W. Rep. 370; *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. Rep. 230; *Hinkle v. Avery*, 88 Iowa, 47, 55 N. W. Rep. 77.

⁴ *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Carriger v. East Tenn. V. & G. R. Co.*, 7 Lea, 388; *Munkres v. Kansas City, St. J. & C. B. R. Co.*, 72 Mo. 514.

⁵ *Dudden v. Clutton Union*, 1 H. & N. 627; *Pyle v. Richards*, 17 Neb. 180, 22 N. W. Rep. 370.

⁶ *Eulrich v. Richter*, 41 Wis. 318; *Barnes v. Sabron*, 10 Nev. 217; *Crawford v. Ram Co.*, 44 Ohio St. 279, 287, 7 N. E. Rep. 429.

ditch, so that a riparian landowner had living water in the ditch, from which he could water his cattle at all seasons of the year, such ditch became a water-course so as to preclude an upper riparian proprietor from diverting the water and thereby depriving the lower proprietor of the use of it.¹

729. By the common law flood water overflowing the banks of a stream is a part of the stream, though not flowing in a channel, and a riparian owner is not allowed to protect his lands by erecting barriers to the injury of another.² This is clearly so in case the flood spreading beyond the banks of the stream forms with the stream one body and flows within the accustomed boundaries of such floods.³ But if a riparian owner can raise the banks of a stream so as to confine the flood water and prevent its overflowing his lands, without occasioning any injury to the property of others, he may do so.⁴

Water which in times of ordinary high water overflows the banks of a stream, and is accustomed to flow down over adjacent low lands in a defined stream, is to be treated as a water-course, rather than as surface water.⁵

Though a stream spreads out into a swamp without a definite channel, if it emerges from the swamp in a definite channel, and can be recognized as the same stream, it is still a natural water-course. The identity of the stream through the swamp may be

¹ Rummell v. Lamb, 100 Mich. 424, 59 N. W. Rep. 167; Hilliker v. Coleman, 73 Mich. 170, 41 N. W. Rep. 219.

² King v. Trafford, 1 B. & Ad. 874; Attorney-Gen. v. Lonsdale, L. R. 7 Eq. 377; Mason v. Shrewsbury & H. R. Co., L. R. 6 Q. B. 578; Lawrence v. Great North. R. Co., 16 Q. B. 643; Cairo V. & C. R. Co. v. Brevoort, 62 Fed. Rep. 129, 25 L. R. A. 527; O'Connell v. East Tenn., V. & G. R. Co., 87 Ga. 246, 13 S. E. Rep. 489, 13 L. R. A. 394; Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. Rep. 339; Crawford v. Rambo, 44 Ohio St. 279, 287, 7 N. E. Rep. 429; Carriger v. E. Tenn. V. & G. R. Co., 7 Lea, 388; Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec.

247; Barden v. Portage, 79 Wis. 126, 48 N. W. Rep. 210; Kansas City M. & B. R. Co. v. Smith (Miss.), 27 L. R. A. 762.

³ Cairo V. & C. R. Co. v. Brevoort, 62 Fed. Rep. 129, 25 L. R. A. 527; Moore v. Chicago, B. & Q. R. Co., 75 Iowa, 263, 39 N. W. Rep. 390; O'Connell v. East Tenn., V. & G. R. Co., 87 Ga. 246, 13 S. E. Rep. 489, 13 L. R. A. 394.

⁴ Trafford v. The King, 8 Bing. 204; Nield v. London & N. W. R'y, L. R. 10 Ex. 4.

⁵ Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. Rep. 339, 8 Am. St. Rep. 668; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. Rep. 429.

disclosed by its current, there being no defined channel. It is a water-course if the continuity of the stream is shown.¹

If after running in a definite channel water spreads over the surface of the ground and never again flows in a regular course or definite channel, it becomes mere surface water.²

730. A definite channel through which surface water flows in times of freshet and heavy rains is regarded as a natural water course.³ This is the case where the surface water from falling rains and melting snow from a hilly region or high bluffs flows through a gorge or ravine in a definite channel, and has always done so during the spring months of every year, and in seasons of heavy rains so far as the memory of man runs; the accustomed channel fairly possesses the legal attributes of a natural water-course. The general rule applicable to surface water does not apply in such an exceptional case.⁴

In general the same rule is applied to surface water flowing in a regular channel that is applied to a water-course. "The owner of the dominant heritage or higher tract of land has the right to have the surface water falling or coming naturally upon his premises pass off the same through the natural drains upon and over the lower or servient lands, and the owner of the dominant heritage may, by ditches, drain his own land into the natural channel, even if the quantity of water thrown upon the servient heritage is thereby increased."⁵

731. Flood water having no definite channel may properly be classed as surface water. An overflow in times of floods from artificial basins or ponds following no definite course is surface water.⁶

¹ *Briscoe v. Drought*, 11 Ir. C. L. R. 250; *Macomber v. Godfrey*, 108 Mass. 219; *Case v. Hoffman*, 84 Wis. 438, 54 N. W. Rep. 793, 20 L. R. A. 40; *Gillett v. Johnson*, 30 Conn. 180; *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; *Robinson v. Shanks*, 118 Ind. 125, 20 N. E. Rep. 713; *West v. Taylor*, 16 Ore. 165, 13 Pac. Rep. 665; *Schlag v. Jones*, 131 Pa. St. 62, 18 Atl. Rep. 1072; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192; *Munkres v. Kansas City R. Co.*, 72 Mo. 514.

² *Hawley v. Sheldon*, 64 Vt. 491, 24 Atl. Rep. 717.

³ *Palmer v. Waddell*, 22 Kans. 352; *Earl v. DeHart*, 12 N. J. Eq. 280, 72 Am. Dec. 395.

⁴ *Bowlsby v. Speer*, 31 N. J. L. 351, 353, per Beasley, C. J.; *Palmer v. Waddell*, 22 Kans. 352.

⁵ *Robb v. Lagrange Village*, 158 Ill. 21, 42 N. E. Rep. 77, per Craig, C. J.; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. Rep. 53.

⁶ *Broadbent v. Ramsbotham*, 11 Exch. 602.

If in times of heavy rains or freshets surface water collects in marshes, hollows or basins or ponds and overflows the banks or edges, even in an appreciable channel, it may be regarded as still being surface water.¹ A temporary channel made by surface water from heavy rainfalls or freshets from melting snow does not constitute a water-course.² Water which collects in low lands or marshes in times of excessive rains or melting snows is surface water.³ But surface water which has reached a natural basin and formed a permanent body of water loses its character as surface water;⁴ and the owner of such land has no right to discharge such water upon the land of others.⁵

732. There are some authorities, however, which hold in general that flood water is surface water.⁶ If the flood water becomes separated from the main stream and spreads out over lower land so that it can never return to that stream, it may properly be regarded as surface water.⁷ Water which has overflowed the banks of a stream during a freshet in consequence of the insufficiency of the channel to hold and carry it off has also been treated as surface water, and as a common enemy against which any landowner affected may protect himself.⁸

The Indiana cases, *Taylor v. Fickas* and the subsequent cases following that authority, are criticised in a recent case before Circuit Court of the United States, *Baker, J.*, saying: "The court assumed, what is not true, in law or physics, that the water of the Ohio river, in times of ordinary floods, is surface water. The cases cited lend no just support to the assumption on which the opinion rests. It is

¹ *Bowlsby v. Speer*, 31 N. J. L. 351, 354, 86 Am. Dec. 216; *Rawston v. Taylor*, 11 Exch. 369.

² *Hill v. Cincinnati, W. & M. R. Co.*, 109 Ind. 511, 10 N. E. Rep. 410.

³ *Boynton v. Gilman*, 53 Vt. 17; *Curtiss v. Ayrault*, 47 N. Y. 73; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Earl v. DeHart*, 12 N. J. Eq. 280, 72 Am. Dec. 395.

⁴ *Schaefer v. Marthaler*, 34 Minn. 487, 57 Am. Rep. 73; *Alcorn v. Sadler*, 66 Miss. 221, 5 So. Rep. 694. And see *Wharton v. Stevens*, 84 Iowa, 107, 15 L. R. A. 630.

⁵ *Whalley v. Lancashire & Y. R. Co.*, 13 Q. B. D. 131.

⁶ *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 283, 38 Am. Rep. 139; *Shelbyville & B. Turnp. Co. v. Green*, 99 Ind. 205; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Morris v. Council Bluffs*, 67 Iowa, 343, 25 N. W. Rep. 274, 56 Am. Rep. 343; *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 433; *Jones v. St. Louis, I. M. & S. R. Co.*, 84 Mo. 151.

⁷ *O'Connell v. East Tenn., V. & G. R. Co.*, 87 Ga. 246, 13 S. E. Rep. 489, 13 L. R. A. 394.

⁸ *Missouri Pac. R. Co. v. Keys*, 55 Kans. 205; *Morris v. Council Bluffs*, 67 Iowa, 343, 25 N. W. Rep. 274.

settled law here, as well as elsewhere, settled beyond serious debate, that a railroad company, in bridging a stream, must provide a water-way for the passage of the water which flows into and down the stream in times of ordinary floods, but it is not bound to provide outlets for surface water. If the water of the Wabash river, in times of ordinary floods, is surface water, a railway company would be under no obligation to provide an outlet for its superabundant water at such times; and the ultimate result would be that all the company need do is to provide outlets sufficient to pass the water which flows in the channel, and within its banks. Such, however, is not the measure of its duty. Either the cases which hold that a railroad company in bridging a stream, must provide a sufficient water-way for the passage of the superabundant water which flows into and down the stream in times of ordinary floods, are unsound, or else the doctrine of *Taylor v. Fickas*, and of the cases which follow it, cannot be upheld.”¹

733. There are exceptional cases which are not dealt with either under the rule that overflowing water is part of the stream, or under the rule that it is surface water. “If the waters of the Mississippi river, which at flood sometimes spread in width from twenty to forty miles, and flow in a continuous and unbroken body down the valley, are to be dealt with as the waters of a stream, and the whole valley is to given up as the course-way of the stream, the most fertile portion of our State may at once be abandoned. From Memphis to Vicksburg, and from the foothills to the river, there is not a square yard of land that was not deposited by the overflowing waters of the river. If the course usually pursued by the ordinary flood waters is the channel of the stream, the whole valley is the channel. * * * The rules governing the rights and duties of individuals in reference to waters rest upon principles which underlie very many other property rights. At last they depend upon the two legal maxims, that one may make such use as he wills of his own, and that he must so use his own as not to impinge the legal rights of others. As to surface water and streams flowing along their channels, general rules have been formulated which are usually applicable, and under which the relative rights and duties of parties may be adjusted, but to apply these rules to waters of a radically different class is to measure different conditions by a

¹ *Cairo, V. & C. R. Co. v. Brevoort*, 62 Fed. Rep. 129, 132.

single standard. To say that flood waters are surface waters, and may always be dealt with as such, or that they may be fenced against as may the waters of the sea, regardless of consequences, would be to give to one riparian owner the power and right of benefiting and preserving his own property at the direct expense of another. But, on the other hand, if it be the rule that alluvial lands subject to occasional floodings are to be dealt with as comprising the bed of a stream, the beneficial ownership therein is practically destroyed in the interest and for the benefit of other riparian owners.”¹

734. A riparian owner has a right to build barriers and confine the waters to the channel of the stream, but he cannot build and maintain a structure which will change the channel or project the waters against or upon the property of others, in such a way as will result in substantial injury to such property.² But a riparian proprietor is liable for erecting on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor to his injury; for, according to the prevailing rule, the waters of a stream when swollen by ordinary floods is not surface water so long as it forms with the stream one body of water which is eventually discharged through the channel of the stream.³

A riparian proprietor who has conveyed to a railway company all the right, title, and estate in a strip of his land which could have been acquired by condemnation thereof for a right of way, has no right to construct along the river bank, over such right of way, a levee which will raise the water flowing in the stream at times of ordinary floods so as to endanger the bridge and other structures of the railway, and will also throw such water upon lands on the oppo-

¹ *Kansas City, M. & B. R. Co. v. Smith* (Miss.), 27 L. R. A. 762, 764, per Cooper, C. J.

² *Parker v. Atchison* (Kans.), 48 Pac. Rep. 631; *Shelbyville & B. Turnp. Co. v. Green*, 99 Ind. 205; *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. Rep. 795, 8 L. R. A. 575.

³ *Cairo, V. & C. R. Co. v. Brevoort*, 62 Fed. Rep. 129; *O'Connell v. East Tenn., V. & G. R. Co.*, 87 Ga. 246, 13 S. E. Rep. 489; *Wharton v. Stevens*, 84 Iowa, 107, 50 N. W. Rep. 562; *Byrne v. Minn. & St. L. R. Co.*, 38 Minn. 212, 36 N. W. Rep. 339; *Jones v. Hannovan*, 55 Mo. 462; *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; *Hartshorn v. Chad-dock*, 135 N. Y. 116, 31 N. E. Rep. 997, 17 L. R. A. 426; *Wallace v. Drew*, 59 Barb. 413; *Ordway v. Canisteo Village*, 66 Hun, 569, 21 N. Y. Supp. 835; *West v. Taylor*, 16 Oreg. 165, 13 Pac. Rep. 665; *Carriger v. East Tenn., V. & G. R. Co.*, 7 Lea, 388; *Burwell v. Hob-son*, 12 Gratt. 322, 64 Am. Dec. 247.

site side of the river, thereby subjecting the railway company to suits for damages.¹

735. A riparian proprietor has no right to go upon another's land to restore to its natural channel flood water which has suddenly been diverted upon his land by a freshet.² But the proprietor on whose land the water leaves its channel may erect barriers to return it to its natural channel.³

736. An inlet from the sea, through which a current flows in and out with the tides is not a water-course, and the abutting owners have no riparian rights such as pertain to a water-course.⁴

II. *Ownership and Use of Flowing Water.*

737. A riparian owner has no ownership of the water flowing in a stream. It is common to all, as are the air and the sunlight. He may use it as it flows; but he has no right to materially diminish the flow in quantity except for ordinary domestic purposes connected with the use of his land, or to corrupt it in quality.⁵ The right to a

¹ *Cairo, V. & C. R. Co. v. Brevoort*, 62 Fed. Rep. 129, 25 L. R. A. 527.

² *Wholey v. Caldwell*, 108 Cal. 95, 30 L. R. A. 820; *Paige v. Rocky Ford Canal & S. Co.*, 83 Cal. 84, 93, 21 Pac. Rep. 1102, 23 Pac. Rep. 875.

³ *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301; *Pierce v. Kinney*, 59 Barb. 56; *Slater v. Fox*, 5 Hun, 544.

⁴ *Chamberlain v. Hemingway*, 63 Conn. 1, 27 Atl. Rep. 239, 22 L. R. A. 45.

⁵ *Embrey v. Owen*, 6 Exch. 353, 10 Eng. Rul. Cas. 179; *Medway Nav. Co. v. Romney*, 9 C. B. N. S. 575; *Dickinson v. Grand Junction Canal*, 7 Ex. 282; *Ellis v. Clemens*, 22 Ont. 216; *Tyler v. Wilkinson*, 4 Mason, 397; *Webb v. Portland Manuf. Co.*, 3 Sumn. 189; *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. Rep. 350.

Alabama: *Ulbricht v. Eufaula W. Co.*, 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572; *Hendricks v. Johnson*, 6 Port. 472.

California: *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674; *Hargrave v.*

Cook, 108 Cal. 72; *McDonald v. Askew*, 29 Cal. 200.

Connecticut: *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Gillett v. Johnson*, 30 Conn. 180; *Agawam Canal Co. v. Edwards*, 36 Conn. 476.

Florida: *Tampa Water Works Co. v. Cline*, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376.

Georgia: *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526.

Illinois: *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Druley v. Adam*, 102 Ill. 177.

Indiana: *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. Rep. 230; *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454.

Iowa: *McCord v. High*, 24 Iowa, 336.

Kansas: *Shamleffer v. Council Grove P. Mill Co.*, 18 Kans. 24; *Union Pac. R. Co. v. Dyche*, 31 Kans. 120, 1 Pac. Rep. 243.

Kentucky: *Anderson v. Cincinnati So. R. Co.*, 86 Ky. 44, 5 S. W. Rep. 49.

Maine: *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Lee v. Pem-*

reasonable use of water flowing over land is inseparably annexed to the soil and passes with it as part of it. Use does not create the right and disuse does not destroy it. "The use of water, flowing in its natural channel, like the use of heat, light, or air, has been held by every civilized nation, from the earliest times, to be common by the law of nature, and not merely public, like the use of a river or a port, which is subject to municipal regulation by the law of the place. They establish, also, that the domestic uses of water are its natural and primary ones. Air is not more indispensable to the

broke Iron Co., 57 Me. 481, 2 Am. Rep. 59; Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Stevens v. Kelley, 78 Me. 445, 6 Atl. Rep. 868.

Massachusetts: Johnson v. Jordan, 2 Met. 236, 37 Am. Dec. 85, per Shaw, C. J.; Cary v. Daniels, 8 Met. 466, 477, 41 Am. Dec. 532; Cary v. Daniels, 5 Met. 236; Merrifield v. Worcester, 110 Mass. 216, 219, 14 Am. Rep. 592; Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349; Luther v. Winnisimmet Co., 9 Cush. 171; Elliot v. Fitchburg R. Co., 10 Cush. 191, 57 Am. Dec. 85.

Michigan: Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102.

Mississippi: Mississippi Cent. R. Co. v. Mason, 51 Miss. 234.

Nebraska: Pyle v. Richards, 17 Neb. 192, 22 N. W. Rep. 370.

New Hampshire: Gerrish v. Clough, 48 N. H. 9, 2 Am. Rep. 165; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287.

New Jersey: Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366; Campbell v. Smith, 8 N. J. L. 140, 14 Am. Dec. 400; Holsman v. Boiling Spring Co., 14 N. J. Eq. 335; Brakely v. Sharp, 10 N. J. Eq. 206.

New York: Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Standen v. New Rochelle Water Co., 91 Hun, 272, 36 N. Y. Supp. 92; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. Rep. 427; Scriver v. Smith, 100 N. Y. 471, 480, 3 N. E. Rep. 675; Gardner v.

Newburgh, 2 Johns. Ch. 162; Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373; Garwood v. N. Y. Cent. & Hudson River R. Co., 83 N. Y. 400, 38 Am. Rep. 452; Crooker v. Bragg, 10 Wend. 260, 25 Am. Dec. 555.

North Carolina: Williamson v. Lock's Creek Canal Co., 78 N. C. 156.

Ohio: Lembeck v. Nye, 47 Ohio St. 336, 21 Am. St. Rep. 828, 8 L. R. A. 578, where the rule was applied to a non-navigable lake.

Oregon: Shaw v. Oswego Iron Co., 10 Ore. 371, 45 Am. Rep. 146; Coffman v. Robbins, 8 Ore. 278; Weiss v. Oregon Iron Co., 13 Ore. 496, 11 Pac. Rep. 255.

Pennsylvania: Philadelphia v. Spring Garden, 7 Pa. St. 348, 363; Philadelphia & R. R. Co. v. Pottsville Water Co., 18 Co. Ct. Rep. 501; Rarick v. Smith, 17 Co. Ct. Rep. 627, 5 Pa. Dist. Ct. 530; Lord v. Meadville Water Co., 135 Pa. St. 122, 20 Am. St. Rep. 864; Wheatley v. Chrisman, 24 Pa. St. 298, 64 Am. Dec. 657; McCoy v. Danley, 20 Pa. St. 85, 57 Am. Dec. 680; Howell v. McCoy, 3 Rawle, 256.

Texas: Fleming v. Davis, 37 Tex. 173; Rhodes v. Whitehead, 27 Tex. 304, 310, 84 Am. Dec. 631.

Vermont: Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; Tuthill v. Scott, 43 Vt. 525, 5 Am. Rep. 301.

Washington: Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425.

support of animal or vegetable life. Water is borne by the air, in the form of vapor, to the remotest regions of the earth, for the free use and common refreshment of mankind; and to interdict the use of the one within any particular locality, would be as monstrous and subversive of the scheme of animal existence, as it would be to interdict the use of the other. It is only when it has been received on the surface of the earth, not while it is falling from the clouds, that it can be made to minister to the ordinary wants of life; and if it be common at first, it must continue to be so while it is returning, by its natural channels, to the ocean. No one, therefore, can have an exclusive right to the aggregated drops that compose the masses thus flowing, without contravening one of the most peremptory laws of nature. Water may be exclusively appropriated by being separated from the mass of the stream, and confined in tanks or trunks; but then it would have ceased to be *aqua pro fluens*. It does not cease to be so, however, by being merely impeded in its natural channel by a dam.”¹

In a later case before the same court the general principle is again stated: “The rule of law is uniform and undoubted that every riparian owner is entitled, as an incident to his land, to the natural flow of the water of a stream running through it, undiminished in quantity and unimpaired in quality, subject to the reasonable use of the water by those similarly entitled, for the ordinary purposes of life; and any sensible or essential interference therewith, if wrongful, whether attended with actual damage or not, is actionable.”²

In an early case the general principles of the law were stated by Lord Kames, the action being for diverting from the lakes of Fany-side, water which descended naturally to the river Aven. “At advising this cause, much darkness was occasioned by a notion which some of the judges unwarily adopted, as if a river could be appropriated like a field or a horse. A river, which is in perpetual motion, is not naturally susceptible of appropriation; and were it susceptible, it would be greatly against the public interest that it should be suffered to be brought under private property. In general, by the laws of all polished nations, appropriation is authorized with respect

¹ Philadelphia v. Spring Garden, 7 [1893], App. Cas. 691; Gillett v. Johnson, 30 Conn. 180; Coit v. Lewiston R. Pa. St. 348, 363, per Gibson, C. J.

² Clark v. Penn. R. Co., 145 Pa. St. Co., 36 N. Y. 214; Wetuppa Reservoir 438, 449, 22 Atl. Rep. 989, per Clark, Co. v. Fall River, 134 Mass. 267. J.; Young v. Bankier Distillery Co.

to every subject that is best enjoyed separately, but barred with respect to every subject that is best enjoyed in common. Water is scattered over the face of the earth in rivers, lakes, etc., for the use of animals and vegetables. Water drawn from a river into vessels or into ponds becomes private property; but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest, by putting it in the power of one man to lay waste a whole country.”¹

738. Riparian proprietors on the opposite sides of a stream have no exclusive title to any part of the water, and no right to equal shares. Each has the right to continue to use the water, whatever the effect may be on the other, unless such other has acquired by grant or prescription, the right to an exclusive use of the water, or the right to use it whenever there is not water enough for both.² As there can be no ownership of the water of a stream except as it is withdrawn and held in possession by a proprietor, and he has only a simple usufruct of it as it passes along, no exclusive title to one-half of the water or to any definite part of it is acquired by the proprietor on one side of the stream as against the proprietor on the opposite side. “Such being their relation to each other, it is obvious that the mere use by one of them of all the water, unaccompanied by any act of exclusion against the other, or by the assertion of any superior or exclusive claim, is not in its nature adverse, does no injury, and affords no cause of complaint or action.”³

It has been held, however, that the owner of an island in a stream and of the mainland on one side of it, the mainland on the opposite side belonging to another, is entitled, for hydraulic purposes, to use the entire natural flow of water in the channel on the side of the island on which he owns the mainland, and to half the flow of water in the opposite channel.⁴

739. In case the water of a river flows in two distinct channels, the riparian owners on either channel are entitled to have flow through their channel so much of the water of the whole river as would naturally flow there and no more. Neither can lawfully

¹ *Magistrates of Linlithgow v. Elphinstone*, Kames' Sel. Dec. 331. *Newburyport Water Co.*, 137 Mass. 163; *Pitts v. Lancaster Mills*, 13 Met. 156.

² *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406.

⁴ *West v. Fox River Paper Co.*, 82 Wis. 647, 52 N. W. Rep. 308.

³ *Pratt v. Lamson*, 2 Allen, 275, 288, per Merrick, J. And see *Moulton v.*

widen or deepen or otherwise improve the channel on his side in such a way as to lessen the natural flow of water in the other channel. Neither is bound to erect or keep up any dam or other artificial obstruction in his channel in order to increase or preserve the flow of water in the other channel.¹

740. A grant by the Legislature of an exclusive right to the water-power of a navigable stream, does not pass a title to the water itself, or prevent its use for the ordinary purposes of life. Hence, where the Legislature granted the privilege and title to all the water-power of the river Schuylkill, which right was subsequently acquired by the city of Philadelphia for the purpose of supplying the city with water, and afterwards the Legislature made a subsequent grant to other municipal corporations of the right to erect works and supply their inhabitants with water from the river, such grant and the acts done thereunder were held not to be in violation of the previous grant of the water-power. The city of Philadelphia acquired no specific property or exclusive right to the water itself.²

But a riparian owner upon a navigable river has no right to appropriate the water in such a way or to such an extent as to interfere with the public rights of navigation.³

741. At common law no title to water can be obtained by prior appropriation.⁴ Thus one who builds a dam for the use of a mill does not by priority in the use of a stream acquire the exclusive

¹ Warren v. Westbrook Manuf. Co., 88 Me. 69, 71, substantially in the language of Emery, J., who further said: "If by reason of the greater natural width or depth, or fall of one channel, a greater proportion of the water of the river flows through that channel than through the other, this greater proportion is the proper natural advantage of the party located on that channel. It is the proper natural advantage of the location for which he presumably paid when he acquired the land on the more favored channel. It is an advantage he cannot be required to share with the party on the other and less favored channel. Such other party cannot avoid the natural disadvantages of his less desirable location. This inequality, when it exists, is natural, not

legal. It is decreed by nature, and human courts are powerless to correct it." See also Warren v. Westbrook Manuf. Co., 86 Me. 32, 38, 29 Atl. Rep. 927, 26 L. R. A. 284, per Emery, J.

² Philadelphia v. Spring Garden, 7 Pa. St. 348.

³ Attorney-General v. Great Eastern Ry., L. R. 6 Ch. 572; Attorney-General v. Terry, L. R. 9 Ch. 423; Attorney-General v. Lonsdale, L. R. 7 Eq. 377.

⁴ Mason v. Hill, 5 Barn. & Ad. 1; Wood v. Waud, 3 Exch. 748; Sampson v. Hoddinott, 1 C. B. N. S. 590; Wright v. Howard, 1 Sim. & Stu. 190. There are some dicta to the contrary prior to the decision in Mason v. Hill, *supra*; Tyler v. Wilkinson, 4 Mason, 397; Webb v. Portland Manuf. Co., 3

right to it, so as to enable him to maintain an action against one erecting a dam and mill higher up the stream by which the water is detained or partly diverted or used to the injury of the first mill-owner, provided the water is not unreasonably detained and is restored without substantial diminution to the stream before it reaches the lower mill.¹

742. In the States of the Pacific Coast and Rocky Mountains water rights may be acquired by prior appropriation. In these States the climate is dry and agriculture is largely dependent upon artificial irrigation. These rights are now established by constitutional and statutory provisions, though they seem to have had their origin in the customs of the early miners of California. The first discoverer of a mine and the first appropriator of a stream of water to wash the mine was regarded as having the better right, and he was regarded as the owner except as against the United States, all the lands being a part of the public domain. The first legislative sanction of these customs was made by the Legislature of California in the year 1851; and there is now legislation securing water rights for irrigation in all the States and territories of the arid region of the United States.²

The doctrine of riparian rights is not recognized in these States.³

743. Under the mill acts of several States certain rights are secured by prior appropriation. Such is the effect of the provision

Sumner, 189; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Ingraham v. Hutchinson, 2 Conn. 584; Evans v. Merriweather, 4 Ill. 492, 38 Am. Dec. 107; Bliss v. Kennedy, 43 Ill. 67; Gibson v. Fischer, 68 Iowa, 29, 25 N. W. Rep. 914; Norway Plains Co. v. Bradley, 52 N. H. 86; Cowles v. Kidder, 24 N. H. 378, 57 Am. Dec. 287; Odiorne v. Lyford, 9 N. H. 502, 32 Am. Dec. 387; Gilman v. Tilton, 5 N. H. 231; Bullen v. Runnels, 2 N. H. 255, 9 Am. Dec. 55.

¹ Parker v. Hotchkiss, 25 Conn. 321; Keeney & W. Manuf. Co. v. Union Manuf. Co., 39 Conn. 576; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Platt v. Johnson, 15 Johns. 213, 8 Am. Dec. 233; Merritt v. Brinkerhoff, 17 Johns. 306, 8 Am. Dec. 404; Pugh

v. Wheeler, 2 Dev. & B. L. 50; Whaler v. Ahl, 29 Pa. St. 98; Hartzall v. Sill, 12 Pa. St. 248; Hoy v. Sterrett, 2 Watts, 327, 28 Am. Dec. 313; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; Martin v. Bigelow, 2 Aik. 184, 16 Am. Dec. 696.

See, however, not in accord with other cases, Tye v. Catching, 78 Ky. 463.

² It is not within the province of this work to state or refer to these statutes, or to discuss their application. Reference may be had to the elaborate treatises of Kinney on Irrigation, and Pomeroy on Water Rights, in which the doctrine of appropriation of waters is fully set forth.

³ Stowell v. Johnson, 7 Utah, 215, 26 Pac. Rep. 290.

that no dam shall be erected to the injury of any other mill lawfully existing either above or below it on the same stream.¹ This regulation of the rights of riparian proprietors is intended to secure the common rights of all in a manner best calculated for that purpose.² It does not protect an unimproved or unappropriated mill site.³

744. Riparian owners have the right to use the water of the stream to drink, and for the ordinary uses of domestic life,⁴ and if there are large towns or cities upon the stream, the collective body of the citizens have the same right. "In the case of a river or public highway all the people of the State have access to it; may ride over it, and use the water. Not so with a private stream. In such case no one can use it or take the water except at a public crossing. There the traveler may stop, refresh himself and water his horse; the water has no owner, and he impairs no man's right. But, except at public crossings, such as a road or a street, no one but a riparian owner can use the water; not because the latter has any ownership in it, but because the stranger has no right of access to it. There can be no such thing as ownership in flowing water; the riparian owner may use it as it flows; he may dip it up and become the owner by confining it in barrels or tanks, but so long as it flows it is as free to all as the light and the air. It follows from what has been said that dwellers in towns and villages watered by a stream may use the water as well as the riparian owner, provided they have access to the stream by means of a public highway."⁵

A riparian owner may, if necessary, consume all the water of a stream for drinking, for culinary and other domestic purposes or for watering his cattle.⁶ But the right to consume water even

¹ *Lincoln v. Chadbourne*, 56 Me. 197; *Wentworth v. Poor*, 38 Me. 243; *Thomas v. Hill*, 31 Me. 252; *Butman v. Hussey*, 12 Me. 407; *Smith v. Agawam Canal Co.*, 2 Allen, 355; *Pratt v. Lamson*, 2 Allen, 275, 288; *Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532; *Gould v. Boston Duck Co.*, 13 Gray, 442.

² *Bates v. Weymouth Iron Co.*, 8 Cush. 548, 553; *Lowell v. Boston*, 111 Mass. 454, 467, 15 Am. Rep. 39, per Wells, J.

³ *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 43.

⁴ *Swindon Water Works v. Wilts Canal, L. R.* 7 H. L. 697, per Cairns, L. C.; *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. Rep. 561; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Anthony v. Lapham*, 5 Pick. 175; *Kaler v. Campbell*, 13 Oreg. 596, 11 Pac. Rep. 301; *Hazeltine v. Case*, 46 Wis. 391, 1 N. W. Rep. 66.

⁵ *Haupt's Appeal*, 125 Pa. St. 211, 224, 17 Atl. Rep. 436, per Paxson, C. J.

⁶ *Spence v. McDonough*, 77 Iowa, 460, 42 N. W. Rep. 371; *Anderson v. Cincinnati S. R. Co.*, 86 Ky. 44, 5 S. W. Rep. 49; *Blanchard v. Baker*, 8

for such purposes is confined to the occupant of the riparian land. He cannot as against the rights of lower riparian owners sell to one who is not a riparian owner the right to divert the water to land not riparian to be used even for domestic purposes.¹

745. For other than domestic purposes, the right of each proprietor in the use of the water is limited by the rights of the other proprietors.² If a riparian proprietor, by placing a dam across a stream running through his land, obstruct the same so that, instead of running on as theretofore to the riparian proprietor below, the water accumulates in an artificial lake or pond, and by means of percolation and evaporation is diminished in quantity to such an extent as to deprive the lower proprietor of the reasonable quantity of water to which he is entitled and which he would otherwise receive, such obstruction of the stream operates as a diversion of the water; and for damages thus occasioned the lower proprietor is entitled to recover. If the diversion be complete, he is entitled to full damages; if partial, the damages should be apportioned.³ “By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.”⁴

Me. 253, 23 Am. Dec. 504; Chatfield v. Wilson, 31 Vt. 358; McElroy v. Goble, 6 Ohio St. 187; Union Mill Co. v. Ferris, 2 Sawyer, 176.

¹ Williams v. Wadsworth, 51 Conn. 277.

² Anderson v. Cincinnati S. R. Co., 86 Ky. 44, 5 S. W. Rep. 49; Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So.

Rep. 78; Ellis v. Tone, 58 Cal. 289; Para Rubber Shoe Co. v. Boston, 139 Mass. 155, 29 N. E. Rep. 544; Arnold v. Foot, 12 Wend. 330; Wheatley v. Chrisman, 24 Pa. St. 298, 64 Am. Dec. 657; Baker v. Brown, 55 Tex. 377.

³ White v. East Lake Land Co., 96 Ga. 415.

⁴ Miner v. Gilmour, 12 Moore, P. C.

746. A riparian owner may use the water of a stream for manufacturing or other extraordinary purposes, provided he restores it to the stream, without unreasonable detention and without substantial diminution before it reaches the land of the next lower proprietor.¹ A lower mill-owner is entitled to have the water of the stream flow in its accustomed quantity, and an upper mill-owner is liable for an unreasonable detention of the water by a dam.² What is an unreasonable detention is a question for the jury.³

One is liable for unreasonably interrupting the flow of a stream and detaining the water by a dam or otherwise to the injury of a mill-owner or other proprietor below.⁴ If he detains the water by a dam and then discharges it into the stream in such quantities as to overflow and injure the lands of a lower riparian owner, he is liable for such injury and may be restrained by injunction.⁵ He is liable also for damages done to the land of an upper riparian owner by a dam or other obstruction in a stream which raises the water or throws it back upon the land of such owner.⁶

In a case where a manufacturer claimed as against a lower

C. 131, 156, 10 Eng. Rul. Cas. 195, per Lord Kingsdown, followed in *Sandwich v. Great Northern R'y*, 10 Ch. D. 707; *Nuttall v. Bracewell*, L. R. 2 Ex. 1.

¹ *Ormerod v. Todmorden Joint Stock Mill Co.*, 11 Q. B. D. 155; *Kensit v. Great Eastern R'y*, 27 Ch. D. 122; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Tyler v. Wilkinson*, 4 Mason, 397; *Gillett v. Johnson*, 30 Conn. 180; *Robinson v. Shanks*, 118 Ind. 125, 20 N. E. Rep. 713; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Ford v. Whitlock*, 27 Vt. 265; *Canfield v. Andrews*, 54 Vt. 1, 41 Am. Rep. 828; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Weiss v. Oregon I. & S. Co.*, 13 Oreg. 496, 11 Pac. Rep. 255; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172; *Garwood v. New York Cent. R. Co.*, 83 N. Y. 400, 116 N. Y. 649, 22 N. E. Rep. 396.

² *Ware v. Allen*, 140 Mass. 513, 5 N. E. Rep. 629; *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. Rep. 786.

³ *Hetrich v. Deachler*, 6 Pa. St. 32.

⁴ *Shears v. Wood*, 7 Moore, 345; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Hinckley v. Nickerson*, 117 Mass. 213; *Clapp v. Herrick*, 129 Mass. 292; *Clinton v. Myers*, 46 N. Y. 511, 517, 7 Am. Rep. 373; *Whaler v. Ahl*, 29 Pa. St. 98; *Phillips v. Sherman*, 64 Me. 171; *Davis v. Winslow*, 51 Me. 264, 290, 81 Am. Dec. 573; *Vliet v. Sherwood*, 35 Wis. 229, 38 Wis. 159.

⁵ *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. Rep. 350; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *McKee v. Delaware & H. Canal Co.*, 125 N. Y. 353, 26 N. E. Rep. 305, affirming 52 Hun, 52, 4 N. Y. Supp. 753; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 24 N. E. Rep. 774, 7 L. R. A. 613; *Hughes v. Anderson*, 68 Ala. 280.

⁶ *Athens Manuf. Co. v. Rucker*, 80 Ga. 291, 4 S. E. Rep. 885; *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38, 7 So. Rep. 212.

riparian owner that he had a legal right to use a reasonable quantity of the water for the purposes of his business, the court replied that the necessities of one's business cannot be the standard of his rights, when these necessities are inconsistent with the rights of his neighbor. However laudable his enterprise may be, he cannot carry it on at the expense of his neighbor.¹

An upper riparian owner has no concern with any use or diversion of the water after it has passed his land, as his rights are not thereby impaired.²

747. A town or village situated on the bank of a stream may use the water for ordinary domestic purposes, to the same extent that any riparian owner can. The water may be taken by an aqueduct for such purposes and for protection against fire and for sanitary purposes. "It is immaterial how the dwellers on the stream take the water for the purposes for which they may lawfully use it. They can drive their cattle to the stream and allow them to quench their thirst, and can carry water in pails to their homes; or each individual can carry the water in a pipe to his dwelling for such use, provided he can secure a right of way for that purpose; or the dwellers on the stream may combine their funds to procure cheaper and better transportation by means of a pipe, and may use the water for their several necessities to the same extent that they could if it flowed past their dwellings in a natural channel."³

An incorporated borough bought a tract of land through which a creek flowed, constructed a reservoir on the tract and conveyed the water therefrom several miles to the borough, for the use of its inhabitants. Another borough was situated two miles above said tract, on the same stream which constituted its main source of water supply. Certain property owners thereof, whose rights were afterwards obtained by a private corporation, started a plant to pump the waters of the stream into a reservoir and thus supply the latter borough, whose permission they had to lay pipes through the streets.

¹ Wheatley v. Chrisman, 24 Pa. St. 298, 64 Am. Dec. 657, per Black, J.; Clark v. Pennsylvania R. Co., 145 Pa. St. 438, 22 Atl. Rep. 989; Pennsylvania R. Co. v. Miller, 112 Pa. St. 34, 3 Atl. Rep. 780; Brace v. Yale, 10 Allen, 441, 4 Allen, 393; Perley v. Marshall, 57 N. H. 206; Stone v. Roscommon Lumber Co., 59 Mich. 24, 26 N. W. Rep. 216.

² Hargrave v. Cook, 108 Cal. 72.

³ Barre Water Co. v. Carnes, 65 Vt. 626, 630, 27 Atl. Rep. 609, 21 L. R. A. 769, 36 Am. St. Rep. 891, per Start, J., citing Philadelphia v. Spring Garden, 7 Pa. St. 348; Evans v. Merriweather, 4 Ill. 492; Spence v. McDonough, 77 Iowa 460, 42 N. W. Rep. 371.

The first named borough filed a bill in equity to restrain the construction of the latter plant and the consequent obstruction of the stream and diversion of the waters, to the injury of the complainants' plant, the supply of water being limited, and the injunction was granted. The rights of the complainants were not those of a riparian owner only, but by act of the Legislature they were entitled by a right of eminent domain to appropriate the water subject to a liability to compensate private owners for injuries thereby done to their property.¹

748. A permanent diversion of the waters of a stream by a riparian owner, for the purpose of supplying a neighboring town with water, is unlawful, and may be enjoined by a lower riparian proprietor.² A water company, as a riparian proprietor, has no greater power than an individual has to take water from an unnavigable stream, to supply a city or a railroad company with water, in such quantities as to unreasonably diminish the supply to other riparian owners.³

749. A riparian owner has no right to diminish the flow of a stream by conducting it away from his own land by pipes and selling it, or by using it for business purposes. His use of the water is limited to such a quantity as does not materially or sensibly diminish the flow of the stream for purposes connected with his own land.⁴ Some loss, however, is necessarily consequent upon the beneficial use of the water for any purpose. "It is obvious that there is scarcely any mode whatever, whether artificial or not, by which water can be beneficially used, which would not be necessarily attended with some degree of loss. It is not practicable for every particle of it which is not used or consumed to be returned to the

¹ Haupt's Appeal, 125 Pa. St. 211, 17 Atl. Rep. 436, 3 L. R. A. 536.

² Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; McCord v. High, 24 Iowa, 336; Gardner v. Newburgh, 2 Johns. Ch. 162; Swindon Water Works Co. v. Wiltz & B. Canal, L. R. 7 H. L. 697.

³ Saunders v. Bluefield Water Works & Imp. Co., 58 Fed. Rep. 133; Higgins v. Flemington Water Co., 36 N. J. Eq. 538; Moulton v. Newburyport W. Co., 137 Mass. 163; Ingraham v. Cam-

den W. Co., 82 Me. 335, 19 Atl. Rep. 861; Lord v. Meadville W. Co., 135 Pa. St. 122, 19 Atl. Rep. 1007, 26 W. N. C. 110.

⁴ Medway Co. v. Romney, 9 C. B. N. S. 575; Swindon Water Works Co. v. Wilts & B. Canal, L. R. 7 H. L. 697; Clark v. Pennsylvania R. Co., 145 Pa. St. 438, 22 Atl. Rep. 989; Carpenter v. Gold, 88 Va. 551, 14 S. E. Rep. 329; Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

original stream. It does not, however, necessarily follow that in such cases there has been an improper use of one's own rights, or an infringement of the rights of others. The principles on this subject, as they are generally, and with substantial accuracy, stated in the books, that each proprietor through whose land the stream runs is entitled to its use, as it is wont to run (*ut currere solebat*) without diminution or alteration; and that the water cannot be diverted in whole or part, but must be returned after it is used to its ordinary channel, are not to be understood so literally as to prevent that small, or unessential, or insensible diminution, variation or loss of the water, which is necessarily consequent upon the beneficial and proper enjoyment of it; for such a strictness of construction would be wholly incompatible with the nature of the element and most of the important purposes for which it was created; and indeed, in most cases, would prevent its beneficial enjoyment at all."¹

750. A railroad company as a riparian proprietor may take water from the stream for its engines and for ordinary use at its stations, provided the quantity of water flowing in the stream is not materially diminished.² A lower riparian proprietor cannot maintain an action for such use of the water unless it appears that he has suffered actual and perceptible damage.³

A railroad company owning land in fee through which flowed a stream took the water from the stream at a point on its own land for the purpose of supplying its locomotives. It was held that this was not a taking under the right of eminent domain but by virtue of the company's rights as a riparian owner, and that it was liable in damages for unreasonably diminishing the quantity of water in the stream. If the company wanted the water it could take it under its right of eminent domain and pay for it.⁴

751. The size and capacity of the stream is of importance in determining the extent to which a riparian owner may take from it

¹ Wadsworth v. Tillotson, 15 Conn. 366, 375, 39 Am. Dec. 391, per Storrs, J. And see Seeley v. Brush, 35 Conn. 419; Bullard v. Saratoga Manuf. Co., 77 N. Y. 525; Lathrop v. Haley, 81 Iowa, 649, 47 N. W. Rep. 878.

² Sandwich v. Great Northern R'y Co., 10 Ch. D. 707; Attorney-General v. Great Eastern R'y, L. R. 6 Ch. 572; Garwood v. New York Cent. R. Co., 83

N. Y. 400, 38 Am. Rep. 452; Elliot v. Fitchburg R. Co., 10 Cush. 191, 57 Am. Dec. 85.

³ Elliot v. Fitchburg R. Co., 10 Cush. 191, 57 Am. Dec. 85.

⁴ Pennsylvania R. Co. v. Miller, 112 Pa. St. 34, 3 Atl. Rep. 780; Philadelphia & R. R. Co. v. Pottsville W. Co., 18 Co. Ct. Rep. (Pa.) 501.

water which does not return to it. However small the stream may be, the riparian owner may use the water for any ordinary domestic purposes, or for purposes necessary for the use of his land, or his cattle may drink it all up. While the lower riparian owner may suffer a loss, it is *damnum absque injuria*. But the case is quite different if he uses the water for manufacturing purposes or for sale, so as to materially diminish the quantity of water in the stream; he thereby interferes with the rights of the lower riparian owners who may maintain an action for the injury. The quantity he may use is not measured by the demands of his business, but is so much as will not materially diminish the stream.¹

What is a reasonable use of the water of a stream depends very much on the particular circumstances of each case,² and is a question for the jury.³

752. Whether a riparian owner may use the water of a stream to irrigate his land depends upon the size of the stream and the quantity of water required for that purpose.⁴ He cannot use for this purpose more than a reasonable quantity considering the condition and size of the stream if he thereby deprives a lower proprietor of the reasonable use of the water for ordinary purposes.⁵ "That a

¹ Clark v. Pennsylvania R. Co., 145 Pa. St. 438, 22 Atl. Rep. 989; Pennsylvania R. Co. v. Miller, 112 Pa. St. 34, 3 Atl. Rep. 780; Wheatley v. Chrisman, 24 Pa. St. 298, 64 Am. Dec. 657; Miller v. Miller, 9 Pa. St. 74, 69 Am. Dec. 545; Castalia Trout Club Co. v. Castalia Sporting Club, 8 Ohio C. C. 194; New York Rubber Co. v. Rothery, 10 N. Y. Supp. 872, 32 N. Y. St. Rep. 905; Gould v. Boston Duck Co., 13 Gray, 442; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. Rep. 813.

² Medway Nav. Co. v. Earl of Romney, 9 C. B. N. S. 575; Swindon Water Works Co. v. Wilts & B. Canal Co., L. R. 9 Ch. 451, affirmed L. R. 7 H. L. 697; Ellis v. Clemens, 21 Ont. 227.

³ Prentice v. Geiger, 74 N. Y. 341; Bullard v. Saratoga Manuf. Co., 77 N. Y. 525; McKee v. Delaware Canal Co., 125 N. Y. 353, 26 N. E. Rep. 305; Bliss v. Kennedy, 43 Ill. 67; Columbus Gas Light Co. v. Freeland, 12 Ohio St.

392; Coldwell v. Sanderson, 69 Wis. 52, 28 N. W. Rep. 232, 33 N. W. Rep. 591; Timm v. Bear, 29 Wis. 254; Holden v. Lake Co., 53 N. H. 552; Amoskeag Manuf. Co. v. Goodale, 46 N. H. 53; Elliot v. Fitchburg R. Co., 10 Cush. 191, 195, 57 Am. Dec. 85; Brace v. Yale, 99 Mass. 488, 97 Mass. 18; Hinckley v. Nickerson, 117 Mass. 213; Gould v. Boston Duck Co., 13 Gray, 442.

⁴ Wood v. Waud, 3 Exch. 748, 10 Eng. Rul. Cas. 226; Sampson v. Hodinott, 1 C. B. N. S. 590.

⁵ Colburn v. Richards, 13 Mass. 420, 7 Am. Rep. 160; Cook v. Hull, 3 Pick. 269, 15 Am. Dec. 208; Anthony v. Lapham, 5 Pick. 175; Paine v. Woods, 108 Mass. 160; Arnold v. Foot, 12 Wend. 330; Williams v. Wadsworth, 51 Conn. 277, 292; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; Learned v. Tange-man, 65 Cal. 334; Messinger's App., 109 Pa. St. 285; Baker v. Brown, 55

portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump — for the mode is not material — to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which in its ordinary operation, will nearly or quite absorb the whole volume of the stream, although the relative position of the land and stream are such that the surplus water, when there is any, is returned to the bed of the stream. The one might be disregarded as a reasonable use, doing no perceptible damage to any lower proprietor, whilst the other would nearly deprive him of the whole beneficial use; and yet, in both, the water would be used for irrigation.”¹

753. A riparian proprietor may grant to one who is not such a proprietor a right to take water from the stream for the use of a mill, and if the water passes again into the stream and flows down to the lower proprietors as before, neither the grantor nor the grantee is liable for a diversion of the water.²

A riparian owner may grant a part of his estate not abutting on the stream, and may make appurtenant to the grant a right to draw water from the stream through his remaining land; and the grantee in such a case may maintain an action for any diversion of the natural flow of the stream disturbing such right.³

A riparian owner may sell and grant to one who is not a riparian owner the right to build a dam upon the grantor's land and divert the water to the grantee's own land; and if the purchaser obtains from

Tex. 377; *Farrell v. Richards*, 30 N. J. Eq. 511, where irrigation interfered with the supply of water to an ancient mill.

¹ *Elliot v. Fitchburg R. Co.*, 10 Cush. 191, 194, 57 Am. Dec. 85, per Shaw, C. J.

² *Kensit v. Great Eastern R'y*, 27 Ch. D. 122; *Nuttall v. Bracewell*, L. R. 2 Ex. 1; *Ormerod v. Todmorden Mill Co.*, 11 Q. B. D. 155.

³ *St. Anthony Falls Water-Power Co. v. Minneapolis*, 41 Minn. 270, 43 N. W. Rep. 56.

the lower riparian owners a release from all claims for damages he is secure in his right as against them.¹

754. Nominal damages may be recovered, though no actual injury is shown, for a diversion of the water of a stream to such an extent as to materially lessen its flow, as such a diversion legally imports an injury to the lower riparian owner.² In 1853 the Pennsylvania Railroad Company began to divert the water of a small stream through a three-inch pipe to a water station upon its road. Thirty years afterwards the capacity of the pipe had been increased to six inches. The owners of a mill-site lower down the stream brought a suit for damages to his mill-site or water power caused by this diversion of the water. A grist-mill had many years before been erected on this site and operated by the water of this stream for many years, but this mill had been abandoned more than six years prior to the institution of this suit, and since that time it had been suffered to go to decay and ruin, and after such abandonment there had been no attempt to operate the mill, or to use the water-power for any purpose whatsoever. It was held that the plaintiffs were entitled to nominal damages, but were not entitled to special damages for none were shown, and they had not laid grounds for special damages by giving notice of their purpose to avail themselves of the water-power by using it or leasing it. "The company was, of course, at all times liable to an action in vindication of the plaintiffs' right, but not for the recovery of actual damage until an actual injury was done. The mill-site was of no use to the plaintiffs, or to a lessee, or to any other person in the absence of a mill, or other useful mechanical construction to which the water might be applied; and until such a structure was erected, or proposed to be erected, how could the diversion of the water cause actual injury? Had the

¹ Williams v. Wadsworth, 51 Conn. 277.

² Kensit v. Great Eastern R'y, 27 Ch. D. 122; Ormerod v. Todmorden Mill Co., 11 Q. B. D. 155; Miller v. Miller, 9 Pa. St. 74, 49 Am. Dec. 545; Delaware & H. Canal Co. v. Torrey, 33 Pa. St. 143; Graver v. Sholl, 42 Pa. St. 58; Hart v. Evans, 8 Pa. St. 13; Clark v. Pennsylvania R. Co., 145 Pa. St. 438, 22 Atl. Rep. 989, 11 R'y & Corp., L. J. 3; New York Rubber Co. v. Rothery,

132 N. Y. 293, 296, 30 N. E. Rep. 841, 44 N. Y. St. Rep. 557; Corning v. Troy Iron & N. Factory, 40 N. Y. 191; Gilzinger v. Saugerties Water Co., 66 Hun, 173, 21 N. Y. Supp. 121; Newhall v. Ireson, 8 Cush. 595, 54 Am. Dec. 790; Stowell v. Lincoln, 11 Gray, 434; Blanchard v. Baker, 8 Me. 253; Chapman v. Copeland, 55 Miss. 476; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254.

diversion ceased, and the full flow of the water been restored, how could that have profited the plaintiffs? They had no means of utilizing the water, and therefore they suffered no actual loss from its diversion. If the plaintiffs had owned the water, they would be entitled to recover its value, but they were only entitled to the use of it as it passed through their property. * * * The true rule in such a case is to estimate the damages sustained from the diversion of the water, in the use of the land for the purposes for which for the time the land was used, or for which it would have been used, but for the refusal of the defendant on due notice to remove the pipe. The injury received, if any, was not to the mill-site, for there was no mill, and the site was useless without a mill. It was to the tract as a whole. It was competent, therefore, for the plaintiffs to introduce evidence to show any actual injury they suffered, within the period of the statute, in the enjoyment of their land from the diversion of the water; and, as a means of computation, they might show that the annual rental value of the land was from this cause reduced, but the annual rental value of the mill-site is necessarily speculative, and therefore inadmissible. Nor was it competent to admit any estimate of annual rental value, made upon the basis of a sale or diversion of the water, for the water does not belong to the plaintiffs. As riparian owners, they were entitled merely to the use of it, as it passed through their property.”¹

A riparian proprietor may maintain an action for the diversion of the water of a stream without alleging that he made any use of the water. His right to the flow of the stream is absolute, and he is entitled to nominal damages for an interruption of this right.² He may also have an injunction to restrain any diversion or interference with the water of the stream in future.³

It is held, however, by many authorities that no action for a diversion or use of stream in a reasonable mode and degree can be maintained unless the plaintiff shows that he has suffered an actual and perceptible damage.⁴

¹ Clark v. Pennsylvania R. Co., 145 Pa. St. 438, 451, 452, 22 Atl. Rep. 989, per Clark, J.

² Parker v. Griswold, 17 Conn. 288, 43 Am. Dec. 739; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Van Sickel v. Haines, 7 Nev. 249; Adams v. Barney, 25 Vt. 225.

³ Clowes v. Staffordshire Potteries Co., L. R. 8 Ch. 125; Pennington v. Brinsop Hall Coal Co., 5 Ch. D. 769.

⁴ Gould on Waters, § 214; Elliot v. Fitchburg R. Co., 10 Cush. 191, 57 Am. Dec. 85; McElroy v. Goble, 6 Ohio St. 187; Canfield v. Andrews, 54 Vt. 1, 41 Am. Rep. 828; Ford v. Whit-

III. *Pollution of a Stream.*

755. A riparian proprietor may be restrained from polluting or discoloring the water of a stream, and he is liable in a suit for damages.¹ “It is certainly true that owing to the wants, if not the necessities of the present age of agriculture, of manufactures, of commerce, of invention and of the arts and sciences, some changes must be tolerated in the channels in which water naturally flows, and in its adaptation to beneficial uses. Reasonable diminution of its quantity in gratifying and meeting customary wants, has always been permitted. So, its temporary detention for manufacturing purposes, followed by its release in increased volume, is a necessary consequence of its utilization as a propelling force. Nor must we shut our eyes to the tendency, the inevitable tendency, of these and other uses, in which water is an indispensable element, to detract somewhat from its normal purity. These modifications of individual right must be submitted to, in order that the greater good of the public be conserved and promoted. But there is a limit to this duty to yield, to this claim and right to expect and demand. The water course must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted, as practically to destroy or greatly impair its value to the lower riparian proprietor. *Sic utere tuo* in such conditions is enjoined by social obligation and by law. It is difficult if not impossible to declare a rule in language so clear

lock, 27 Vt. 265; Norway Plains Co. v. Bradley, 52 N. H. 86; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391.

¹ Pennington v. Brinsop Hall Coal Co., 5 Ch. D. 769; Rylands v. Fletcher, L. R. 3 H. L. 330; Russell v. Shenton, 3 Q. B. 449; Barrett v. Mt. Greenwood Cem. Asso., 159 Ill. 385, 42 N. E. Rep. 891, 31 L. R. A. 109, reversing 57 Ill. App. 401; Dwight v. Hayes, 150 Ill. 273; Robb v. LaGrange, 158 Ill. 21; Minke v. Hopeman, 87 Ill. 450; Spence v. McDonough, 77 Iowa, 460, 42 N. W. Rep. 371; Satterfield v. Rowan, 83 Ga. 187, 9 S. E. Rep. 677; Jackman v. Arlington Mills, 137 Mass. 277; Dwight Printing Co. v. Boston, 122 Mass. 583; Woodward v. Worcester,

121 Mass. 245; Prentice v. Geiger, 74 N. Y. 341; Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567; Woodyear v. Shaefer, 57 Md. 1, 40 Am. Rep. 419; Baltimore v. Warren Manuf. Co., 59 Md. 96; Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763; Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366; Good v. Altoona, 162 Pa. St. 493, 29 Atl. Rep. 741; McCallum v. Germantown Water Co., 54 Pa. St. 40; Barclay v. Commonwealth, 25 Pa. St. 503, 64 Am. Dec. 715; Howell v. McCoy, 3 Rawle, 256; Fiske v. Wetmore, 15 R. I. 354, 5 Atl. Rep. 375, 10 Atl. Rep. 627; Silver Spring B. & D. Co. v. Wanskuck Co., 13 R. I. 611; Lyon v. McLaughlin, 32 Vt. 423; Canfield v. Andrews, 54 Vt. 51, 41 Am. Rep. 828.

and precise as that it can be applied with certainty to every case that may arise."¹

A landowner is not excused for allowing polluted water to escape from his land upon the adjoining land because he had no knowledge of the nuisance, and was not negligent in permitting it;² nor is he justified because others have already polluted the water so as to render it unfit for use.³

756. It is no excuse that the fouling of the water is occasioned by mining operations prosecuted in the ordinary way. A riparian proprietor had for sixty years used the water of the stream for the purposes of a distillery, when the owners of a coal mine, without any prescriptive right so to do, poured into the stream a large body of water which they pumped up from their mines, which water, if it had been left to the law of gravitation, would have never reached the stream. The proprietors of the distillery did not complain of the increased volume of the stream, but that the foreign water was of a character and quality different from that of the natural stream, and that it prejudicially affected the water of the stream for distillery purposes. It was held by the House of Lords, affirming the decision of the Court of Session, that the owner of the distillery was entitled to have the owners of the coal mine interdicted from discharging the mine water into the stream.⁴

¹ *Tennessee Coal, Iron & R. v. Hamilton*, 100 Ala. 252, 260, per Stone, C. J. See also *Mississippi Mills Co. v. Smith*, 69 Miss. 299; *Sanderson v. Penn. Coal Co.*, 86 Pa. St. 401, 27 Am. Rep. 711.

² *Humphries v. Cousins*, 2 C. P. D. 239.

³ *Wood v. Waud*, 3 Ex. 748; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769.

⁴ *Young v. Bankier Distillery Co.* [1893], App. Cas. 691. See also *Fletcher v. Smith*, 2 App. Cas. 781; *Wilson v. Waddell*, 2 App. Cas. 95; *Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. N. S. 376; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. Div. 769; *Clowes v. Staffordshire Potteries W. W. L.* R. 8 Ch. 125; *Crossley v. Lightowler*, L. R. 3 Eq. 279, L. R. 2 Ch. 478; *Attorney-General*

v. Lunatic Asylum, L. R. 4 Ch. 146; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Woodruff v. North Bloomfield Gravel Co.*, 8 Sawyer, 628, 9 Ib. 441, 18 Fed. Rep. 753; *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172; *Lincoln v. Taunton Copper Manuf. Co.*, 9 Allen, 181; *Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. Rep. 432; *Columbus & I. Coal & S. Co. v. Tucker*, 48 Ohio St. 41, 26 N. E. Rep. 630, 12 L. R. A. 577; *Drake v. Lady Ensley Coal & I. Co.*, 102 Ala. 501, 24 L. R. A. 64; *Tennessee Coal, I. & R. Co. v. Hamilton*, 100 Ala. 252; *Levaroni v. Miller*, 34 Cal. 231, 91 Am. Dec. 692; *Wixon v. Bear River & A. W. & M. Co.*, 24 Cal. 367, 85 Am. Dec. 69; *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412, 40 Am. Rep. 118; *Lincoln v.*

In Pennsylvania it is held that no action can be maintained for the pollution of a stream by the reason of the mere flowage of natural water from a mine, through the act of mining prosecuted in a lawful manner. The ground of the decision was that the owner of the mine had done nothing to change the character of the water, save what resulted from the natural use of his own property.¹ The owner of coal mines may deposit the refuse and culm upon his own lands, and if such material be carried by extraordinary floods into a stream which runs through the land of a lower owner, and from thence spreads over such land, the owner of the coal lands is not responsible in damages to the lower owner for the injury thus sustained; but if the refuse be placed on his own land in a position where it will be washed into the stream by ordinary storms, or if he deposits his refuse and culm directly in the stream, and damage thereby results to the lower owner, the mine owner or operator is liable for the damage and injury thus occasioned to the lower owner.³

If the polluted water from a mine is discharged by an artificial water-way into a stream which does not form the natural drainage of the land upon which the mine is situated, the owner of the mine is liable for the damages occasioned or he may be enjoined.³

757. A landowner may pollute the water percolating in his own soil, provided he does not allow the polluted water to escape into the adjacent land;⁴ but he is liable to the owner of such adjacent land for any injury occasioned by such offensive water percolating into or flowing upon his neighbor's land. It is the duty of every landowner to so use his own property as not to injure that of his neighbor by the escape of defiled or offensive water.⁵ If one is

Rodgers, 1 Mont. 217; Fuller v. Swan River Placer Min. Co., 12 Colo. 12, 19 Pac. Rep. 836.

¹ Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. Rep. 453. This case is not overruled in subsequent decisions but is commented upon and limited, and its authority seems to be weakened. Neither is this decision in accord with the earlier decisions in the same case in Sanderson v. Pennsylvania Coal Co., 86 Pa. St. 401, 27 Am. Rep. 711, 102 Pa. St. 370; Pennsylvania Coal Co. v. Sanderson, 94 Pa. St. 302, 39 Am. Rep. 785.

² Hindson v. Markle, 171 Pa. St. 138. And see Lentz v. Carnegie, 145 Pa. St. 612, 23 Atl. Rep. 219; Robb v. Carnegie, 145 Pa. St. 324, 22 Atl. Rep. 649, 14 L. R. A. 329; Elder v. Lykens Val. Coal Co., 157 Pa. St. 490.

³ Williams v. Union Improvement Co., 1 Pa. Dist. Rep. 288, 6 Kulp, 417.

⁴ Ballard v. Tomlinson, 29 Ch. D. 115.

⁵ Gawtry v. Leland, 31 N. J. Eq. 385; Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. Rep. 937, 7 L. R. A. 451; Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143, 18 Atl. Rep. 1012, 6 L. R. A. 280. See, however, Dillon v.

negligent in allowing polluted water to escape upon the land of another, he is liable for the injury done.¹

758. In those States in which the doctrine of prior appropriation is established, the decisions in regard to pollution are somewhat modified. An upper proprietor by prior appropriation is entitled to use the water for the purpose for which he appropriated it, though by such use the quality of the water which flows to lower proprietors is deteriorated in quality;² and such prior appropriator is also entitled as against persons subsequently locating further up the stream to receive the water without material diminution in quantity or quality;³ but an injunction against the operations of such upper proprietors will not be granted if upon the evidence it is doubtful whether the water is deteriorated for the use of the prior appropriator, or if it appears that the latter can easily keep the water fit for his purpose.⁴

IV. *Rights as to Surface Water.*

759. Under the rule of the common law, the owner of the upper estate may appropriate or withhold, and the owner of the lower estate may repel, surface water, or water superficially percolating upon or from his estate. Under this rule surface water is regarded as a common enemy which every one may get rid of as best he can.⁵

Acme Oil Co., 49 Hun, 565, 18 N. Y. St. 477.

¹ Ball v. Nye, 99 Mass. 582, 584, 97 Am. Dec. 56; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Wahle v. Reinbach, 76 Ill. 322; Columbus Gas Light Co. v. Freeland, 12 Ohio St. 392.

² Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113; Alder Gulch Consol. M. Co. v. Hayes, 6 Mont. 31, 9 Pac. Rep. 581.

³ Hill v. Smith, 27 Cal. 476; Crane v. Winsor, 2 Utah, 248; Atchison v. Peterson, 1 Mont. 561.

⁴ Atchison v. Peterson, 20 Wall. 507.

⁵ Williams v. Richards, 23 Ont. 651.

Connecticut: Byrne v. Farmington, 64 Conn. 367; Grant v. Allen, 41 Conn. 156; Chadeayne v. Robinson, 55 Conn. 345, 3 Am. St. Rep. 55; Adams v. Walker, 34 Conn. 466, 91 Am. Dec. 742.

Indiana: Schlichter v. Phillipy, 67 Ind. 201; Shelbyville & B. T. Co. v. Green, 99 Ind. 205; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Benthall v. Seifert, 77 Ind. 302; Cairo & Vinc. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Hill v. Cincinnati, W. & M. R. Co., 109 Ind. 511, 10 N. E. Rep. 410.

Iowa: Preston v. Hull, 77 Iowa, 309, 42 N. W. Rep. 305; Morris v. Council Bluffs, 67 Iowa, 343, 25 N. W. Rep. 274; Wilson v. Duncan, 74 Iowa, 491, 38 N. W. Rep. 371. See, however, Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563, opinion by Dillon, J.

Kansas: Chicago, K. & N. W. R. Co. v. Steck, 51 Kans. 737; Atchison, T. & S. F. R. Co. v. Hammer, 22 Kans. 763; Missouri Pac. R. Co. v. Keys, 55 Kans. 205, 40 Pac. Rep. 275; Kansas City & E. R. Co. v. Riley, 33 Kans. 374, 6

The owner of the upper estate may withhold such water and prevent its reaching the lower land of an adjoining owner, or he may

Pac. Rep. 581, 20 Am. & Eng. R. Cas. 116; Gibbs v. Williams, 25 Kans. 214, 37 Am. Rep. 241.

Maine: Murphy v. Kelley, 68 Me. 521; Morrison v. Bucksport & B. R. Co., 67 Me. 353; Bangor v. Lansil, 51 Me. 521; Greeley v. Maine Cent. R. Co., 53 Me. 200.

Massachusetts: Cassidy v. Old Colony R. Co., 141 Mass. 174, 5 N. E. Rep. 142; Bates v. Smith, 100 Mass. 181; Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625; Barry v. Lowell, 8 Allen, 127; Dickinson v. Worcester, 7 Allen, 19; Franklin v. Fisk, 13 Allen, 211, 90 Am. Dec. 194; Ashley v. Wolcott, 11 Cush. 192; Flagg v. Worcester, 13 Gray, 601; Parks v. Newburyport, 10 Gray, 28; Luther v. Winnisimmet Co., 9 Cush. 171; Morrill v. Hurley, 120 Mass. 99.

Minnesota: Sheehan v. Flynn (Minn.), 26 L. R. A. 632; Rowe v. St. Paul, M. & M. R. Co., 41 Minn. 384, 43 N. W. Rep. 76, 16 Am. St. Rep. 706.

Missouri: Jones v. Hannovan, 55 Mo. 462; Doerbaum v. Fischer, 1 Mo. App. 149; Burke v. Missouri Pac. R. Co., 29 Mo. App. 370; McCormick v. Kansas City, St. J. & C. B. R. Co., 57 Mo. 433; Abbott v. Kansas City, St. J. & C. B. R. Co., 83 Mo. 271, 53 Am. Rep. 581; Gray v. Schriber, 58 Mo. App. 173; Jones v. St. Louis, I. M. & S. R. Co., 84 Mo. 151. The cases of Shane v. Kansas City & C. B. R. Co., 71 Mo. 237, 36 Am. Rep. 480; McCormick v. Kansas City, St. J. & C. B. R. Co., 70 Mo. 359, are overruled or distinguished.

Nebraska: Davis v. Londgreen, 8 Neb. 43; Beatrice v. Leary, 45 Neb. 149, 63 N. W. Rep. 370; Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406.

New Hampshire: Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276.

New Jersey: Bowlsby v. Speer, 31 N.

J. L. 351, 86 Am. Dec. 216, overruling Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395. See also Field v. West Orange, 36 N. J. Eq. 118; Davison v. Hutchinson, 44 N. J. Eq. 474, 15 Atl. Rep. 257.

New York: Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519, 19 Hun, 320; Peck v. Goodberlett, 109 N. Y. 180, 16 N. E. Rep. 350; Gould v. Booth, 66 N. Y. 62; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Vanderwiele v. Taylor, 65 N. Y. 341; Curtiss v. Ayrault, 47 N. Y. 73; Goodale v. Tuttle, 29 N. Y. 459; Wagner v. Long I. R. Co., 2 Hun, 633; White v. Sheldon, 35 Hun, 193; Waffle v. New York Cent. R. Co., 58 Barb. 413; Trustees v. Youmans, 50 Barb. 316; White v. Sheldon, 8 N. Y. Supp. 212, 28 N. Y. St. Rep. 475.

Rhode Island: Wakefield v. Newell, 12 R. I. 75, 34 Am. Rep. 598; Buffum v. Harris, 5 R. I. 243.

South Carolina: Edwards v. Charlotte, C. & A. R. Co., 39 S. C. 472, 18 S. E. Rep. 58, 22 L. R. A. 246.

Texas: Gross v. Lampasas, 74 Tex. 195, 11 S. W. Rep. 1086.

Vermont: Beard v. Murphy, 37 Vt. 99, 86 Am. Dec. 693; Chatfield v. Wilson, 28 Vt. 49; Boynton v. Gilman, 53 Vt. 17.

Washington: Cass v. Dicks, 14 Wash. 75, 44 Pac. Rep. 113.

Wisconsin: Lessard v. Stram, 62 Wis. 112, 22 N. W. Rep. 284; Eulrich v. Richter, 37 Wis. 226; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50; O'Connor v. Fond du Lac, A. & P. R. Co., 52 Wis. 526, 9 N. W. Rep. 287, 38 Am. Rep. 754; Johnson v. Chicago, St. P., M. & O. R. Co., 80 Wis. 641, 50 N. W. Rep. 771, 27 Am. St. Rep. 76, 14 L. R. A. 495. This case qualifies the general rule.

divert it from such land. Such water belongs absolutely to the owner of the ground on the surface of which it is found. "No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which the water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel."¹

760. The owner of land may prevent surface water accumulated elsewhere from coming upon it, or he may alter the natural course of such water, although he thereby makes it to flow upon the adjoining land of another to his injury. "*Cujus est solum, ejus est usque ad coelum* is a general rule, applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained by any consideration of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil."²

761. But while one may erect barriers on his own land to prevent the flowing of surface water upon it from his neighbor's land, he cannot erect such barrier upon his neighbor's land, without express permission;³ and it is no justification for his doing so that the flow of the water is endangering the wall of his house, and that he has given notice to his neighbor and he has neglected to take any action.⁴

¹ Broadbent v. Ramsbotham, 11 109, 87 Am. Dec. 625, per Bigelow, Exch. 602, 614, per Alderson, B. C. J.

² Gannon v. Hargadon, 10 Allen, 106, ³ Grant v. Allen, 41 Conn. 156.

⁴ Grant v. Allen, 41 Conn. 156.

762. Under the rule of the civil law the lower of two adjacent estates owes a servitude to the other to receive the natural drainage, and the other estate cannot withhold from the lower the supply of water flowing naturally.¹ According to this rule there is a natural easement for the flow of water from one of two adjoining tracts of land upon another which is lower in situation, so that water falling or collecting by melting snow or the like naturally descends from the one upon the other. It is a question of fact in such case where the natural flow of the water is.²

763. Such natural easement applies only to surface water which naturally collects upon the higher land and flows upon the lower. It does not apply to water artificially collected upon the higher land.

Alabama: Savannah, Americus & M. R. Co. v. Buford, 106 Ala. 303, 312; Farris v. Dudley, 78 Ala. 124, 56 Am. Rep. 24; Crabtree v. Baker, 75 Ala. 91 51 Am. Rep. 424; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Mayor v. Jones, 58 Ala. 654.

California: McDaniel v. Cummings, 83 Cal. 515, 23 Pac. Rep. 795, 8 L. R. A. 575; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Gray v. McWilliams, 98 Cal. 157, 32 Pac. Rep. 976, 35 Am. St. Rep. 163, 21 L. R. A. 593; Drew v. Hicks (Cal.), 35 Pac. Rep. 563.

Georgia: Goldsmith v. Elsas, 53 Ga. 186.

Illinois: Peck v. Herrington, 109 Ill. 611, 50 Am. Rep. 627; Hicks v. Silliman, 93 Ill. 255; Laney v. Jasper, 39 Ill. 46; Gillham v. Madison Co. R. Co., 49 Ill. 484, 95 Am. Dec. 627; Gormley v. Sanford, 52 Ill. 158; Herrington v. Peck, 11 Ill. App. 62; Mellor v. Pilgrim, 7 Ill. App. 306; Totel v. Bonnefoy, 123 Ill. 653, 14 N. E. Rep. 687; Dixon v. Baker, 65 Ill. 518, 16 Am. Rep. 591; Patneaud v. Claire, 32 Ill. App. 554; Anderson v. Henderson, 124 Ill. 164, 16 N. E. Rep. 232.

Louisiana: Code, art. 656; Foley v. Godchaux, 48 La. Ann. 466, 19 So. Rep. 247; Minor v. Wright, 16 La.

Ann. 151; Martin v. Jett, 12 La. 501, 32 Am. Dec. 120; Ludeling v. Stubbs, 34 La. Ann. 935.

Maryland: Philadelphia, W. & B. R. Co. v. Davis, 68 Md. 281, 34 Am. & Eng. R. Cas. 143.

Michigan: Boyd v. Conklin, 54 Mich. 583, 20 N. W. Rep. 595, 52 Am. Rep. 831; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. Rep. 367.

North Carolina: Porter v. Durham, 74 N. C. 767; Overton v. Sawyer, 1 Jones L. 308, 62 Am. Dec. 170.

Ohio: Sheldon v. Cole, 3 Ohio Dec. 473; Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Butler v. Peck, 16 Ohio St. 335, 88 Am. Dec. 452; Crawford v. Rambo, 44 Ohio St. 279.

Pennsylvania: Miller v. Laubach, 47 Pa. St. 154, 86 Am. Dec. 521; Kauffman v. Griesemer, 26 Pa. St. 407, 67 Am. Dec. 437; Martin v. Riddle, 26 Pa. St. 415; Hays v. Hinkleman, 68 Pa. St. 324; Rhoads v. Davidheiser, 133 Pa. St. 226, 19 Atl. Rep. 400.

Tennessee: Louisville & N. R. Co. v. Hays, 11 Lea, 382, 47 Am. Rep. 291, 14 Am. & Eng. R. Cas. 284; Carriger v. East Tenn. & V. R. Co., 8 Lea, 388.

² Totel v. Bonnefoy, 123 Ill. 653, 14 N. E. Rep. 687; Peck v. Herrington, 109 Ill. 611, 50 Am. Rep. 627; Groff v. Ankenbrandt, 124 Ill. 51, 15 N. E. Rep. 40.

Thus the owner of the upper land who uses water from artificial sources for the purpose of irrigating his land has no easement to let the waste water flow over the land of his neighbor in such quantities as to damage his property.¹ Even if he has acquired a right by prescription to let such waste waters flow over the land of his neighbor, the prescription does not apply to unusual and unnatural quantities of water which are injurious to the lower land of his neighbor.

764. Neither under the rule of the civil law nor of the common law is one permitted to collect surface water in artificial channels, and to discharge it in undue and unnatural quantities upon the land of another.² It is immaterial whether the water is strictly surface

¹ *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523.

² *Hurdman v. North Eastern R. Co.*, 3 C. P. Div. 168.

Alabama: *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Dec. 147; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424.

California: *Drew v. Hicks* (Cal.), 35 Pac. Rep. 563; *Ogburn v. Connor*, 46 Cal. 346, 352, 13 Am. Rep. 213; *Learned v. Castle*, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11.

Georgia: *Martin v. Gainsville, Jeff. & So. R. Co.*, 78 Ga. 307. See *Goldsmith v. Elsas*, 53 Ga. 186.

Illinois: *Hicks v. Silliman*, 93 Ill. 255; *Mellor v. Pilgrim*, 3 Ill. App. 476, 7 Ill. App. 306; *Weidekin v. Snellson*, 17 Ill. App. 461; *Dayton v. Ruthersford*, 128 Ill. 271, 21 N. E. Rep. 198; *Anderson v. Henderson*, 124 Ill. 164, 16 N. E. Rep. 232.

Indiana: *Weddell v. Hapner*, 124 Ind. 315, 24 N. E. Rep. 368; *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Reed v. Cheney*, 111 Ind. 387, 12 N. E. Rep. 717; *Davis v. Crawfordsville*, 119 Ind. 1, 21 N. E. Rep. 449, 12 Am. St. Rep. 361.

Iowa: *Stinson v. Fishel*, 93 Iowa, 656, 61 N. W. Rep. 1063; *Williamson v. Oleson*, 91 Iowa, 290, 59 N. W. Rep.

267, 34 Am. & Eng. R. Cas. 152; *Collins v. Keokuk*, 91 Iowa, 293, 59 N. W. Rep. 200; *Wharton v. Stevens*, 84 Iowa, 107, 50 N. W. Rep. 562; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563.

Massachusetts: *Bates v. Westborough*, 151 Mass. 174, 181, 23 N. E. Rep. 1070, *Holmes, J.*, citing *Cassidy v. Old Colony R. Co.*, 141 Mass. 174, 179, 5 N. E. Rep. 142; *Jackman v. Arlington Mills*, 137 Mass. 277, 283; *Rathke v. Gardner*, 134 Mass. 14, 16; *Curtis v. Eastern R. Co.*, 98 Mass. 428, 431; *White v. Chapin*, 12 Allen, 516, 520; *Dickinson v. Worcester*, 7 Allen, 19.

Michigan: *Osten v. Jerome*, 93 Mich. 196, 53 N. W. Rep. 7; *Yerex v. Eineder*, 86 Mich. 246, 48 N. W. Rep. 875; *Chapel v. Smith*, 80 Mich. 100, 45 N. W. Rep. 69; *Gregory v. Bush*, 64 Mich. 37, 31 N. W. Rep. 90.

Minnesota: *O'Brien v. St. Paul*, 25 Minn. 333, 33 Am. Rep. 470; *Hogenson v. St. Paul, M. & M. R. Co.*, 31 Minn. 224, 17 N. W. Rep. 374, 14 Am. & Eng. R. Cas. 291; *Olson v. St. Paul, M. & M. R. Co.*, 38 Minn. 419, 37 N. W. Rep. 953.

Missouri: *Martin v. Benoist*, 22 Mo. App. 262; *Paddock v. Somes*, 102 Mo. 226, 14 S. W. Rep. 746, 10 L. R. A. 254; *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 433, 70 Mo. 359; *Ben-*

water, or is spring water or drainage water.¹ If a railroad is so constructed that it diverts water, either in streams having channels and banks, or mere surface water, and causes it in unnatural and undue quantities to overflow the land of another, the company is liable for the damages done to the land of the owner below.²

The owner of the higher land has no right to collect the surface water upon his land into a drain or ditch, and throw it increased in quantity upon the land of the adjoining owner, or discharge it upon his land in a manner different from the natural flow of the surface water, even though the ditch or drain was constructed in the course of the ordinary use and improvement of the owner's farm.³

son v. Chic. & Alton & A. R. Co., 78 Mo. 504; Rychlicki v. St. Louis, 98 Mo. 497, 11 S. W. Rep. 1001.

Mississippi: Kansas City, M. & B. R. Co. v. Lackey, 72 Miss. 881; Illinois Cent. R. Co. v. Miller, 68 Miss. 760, 10 So. Rep. 61; Alcorn v. Sadler, 66 Miss. 221, 5 So. Rep. 694.

Nebraska: Davis v. Londgreen, 8 Neb. 43; Pyle v. Richards, 17 Neb. 180, 22 N. W. Rep. 370; Fremont, E. & M. V. R. Co. v. Marley, 25 Neb. 138, 40 N. W. Rep. 948; Lincoln St. R. Co. v. Adams, 41 Neb. 737, 60 N. W. Rep. 83.

Nevada: Boynton v. Longley, 19 Nev. 69, 6 Pac. Rep. 437.

New Hampshire: Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584.

New Jersey: Kelly v. Dunning, 39 N. J. Eq. 482; Field v. West Orange, 36 N. J. Eq. 118.

New York: Byrnes v. Cohoes, 67 N. Y. 204; Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. Rep. 316; Foot v. Bronson, 4 Lans. 47; Lynch v. New York, 76 N. Y. 60, 63, 32 Am. Rep. 271; Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540; Vanderwiele v. Taylor, 65 N. Y. 341; McCormick v. Horan, 81 N. Y. 86, 37 Am. Rep. 479; Barkley v. Wilcox, 86 N. Y. 140, 148, 40 Am. Rep. 519; Vernum v. Wheeler, 35 Hun, 53; Peck v. Goodberlett, 109 N. Y. 180, 16 N. E. Rep. 350; Mitchell v. New York, L. E. & W. R. Co., 36 Hun, 177.

North Carolina: Porter v. Durham, 74 N. C. 767.

Ohio: Butler v. Peck, 16 Ohio St. 335, 88 Am. Dec. 452.

Pennsylvania: Martin v. Riddle, 26 Pa. St. 415; Kauffman v. Griesemer, 26 Pa. St. 407, 67 Am. Dec. 437; Hays v. Hinkleman, 68 Pa. St. 324; Rhoads v. Davidheiser, 133 Pa. St. 226, 19 Atl. Rep. 400; Miller v. Laubach, 47 Pa. St. 154, 86 Am. Dec. 521.

Tennessee: Gray v. Knoxville, 85 Tenn. 99, 1 S. W. Rep. 622.

Texas: Gulf, C. & S. R. Co. v. Donahoo, 59 Tex. 128; Galveston, H. & S. A. R. Co. v. Tate, 63 Tex. 223.

Vermont: Wead v. St. Johnsbury & L. C. R. Co., 64 Vt. 52, 24 Atl. Rep. 361.

West Virginia: Hargreaves v. Kimberley, 26 W. Va. 787, 57 Am. Rep. 121; Knight v. Brown, 25 W. Va. 808; Gillison v. Charleston, 16 W. Va. 282, 37 Am. Rep. 763.

Wisconsin: Wentlandt v. Cavanaugh, 85 Wis. 256, 55 N. W. Rep. 408; Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50.

¹ Paddock v. Somes, 102 Mo. 226, 14 S. W. Rep. 746, 10 L. R. A. 254.

² Illinois Cent. R. Co. v. Miller, 68 Miss. 760, 10 So. Rep. 61; Kansas City, M. & B. R. Co. v. Lackey, 72 Miss. 881;

³ Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563, per Dillon, J., Deigleman v. New York, L. E. & W.

A slight increase in the quantity of the flow or a slight acceleration will not support an action unless the lower proprietor shows an actual injury.¹

765. The common-law rule that each riparian owner may get rid of surface water as best he can is frequently modified by the rule that he must so use his own as not necessarily or unreasonably to injure his neighbor. Under this rule it is the duty of an owner draining his own land to deposit the surface water in some natural drain, where there will be a natural flow of the water if one is reasonably accessible; and he is entitled to deposit the same in such natural drain, though it is thereby conveyed upon the land of his neighbor, if it does not thereby unreasonably injure him.²

In Missouri it is provided by statute that an owner of lands may construct drains for agricultural purposes only, into any natural water-course, or any natural depression whereby the water will be carried into any natural water-course, without being liable to damages.³

766. The right of the upper landowner to discharge water on the lower lands of his neighbor is in general a right of flowage only in the natural ways and natural quantities. If he alters the natural conditions so as to change the course of the water, or concentrate it at a particular point, or by artificial means to increase its volume, he becomes liable for any injury caused thereby.⁴

R. Co., 12 N. Y. Supp. 83, 34 N. Y. St. Rep. 4. See, however, *Sowers v. Shiff*, 15 La. Ann. 300.

¹ *Jeffers v. Jeffers*, 107 N. Y. 650, 14 N. E. Rep. 316; *Rutherford v. Holley*, 105 N. Y. 632, 11 N. E. Rep. 818; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. Rep. 350; *Guesnard v. Bird*, 33 La. Ann. 796.

² *Sheehan v. Flynn* (Minn.), 61 N. W. Rep. 462, 26 L. R. A. 632; *O'Brien v. St. Paul*, 25 Minn. 335, 33 Am. Rep. 470; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Sinai v. Louisville, N. O. & T. R. Co.*, 71 Miss. 547; *Lattimore v. Davis*, 14 La. Ann. 161, 33 Am. Dec. 581; *Kilgore v. Grevemberg*, 10 La. Ann. 689, 63 Am. Dec. 597; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199.

³ R. S. 1889, § 4489; *Gray v. Schriber*, 58 Mo. App. 173.

⁴ *Pfeiffer v. Brown*, 165 Pa. St. 267, 273, 30 Atl. Rep. 844, 44 Am. St. Rep. 660, per Mitchell, J., who further said: "In the present case, the defendants, by drilling a well and pumping, increased the aggregate quantity of water discharged, concentrated it at an artificial point of flow, and changed its character from fresh to salt, whereby it became more injurious to plaintiff's land. *Prima facie* therefore they were liable in this action and the burden of proof was on them to show some reason why the general rule should not apply. This they endeavored to do by the claim that the water was discharged in the lawful and proper use of their own land. The exception is well

One having a natural pond upon his land, formed by the surface water from the surrounding land, the water having no means of escape except by evaporation or percolation, has no right by means of a ditch to discharge such water upon the land of his neighbor, to his injury. The latter has an absolute right to occupy and use his land for such lawful purpose as he may see fit, unmolested by the discharge of surface water upon it from the land of another. If the injury is likely to be permanent or to be constantly repeated, an injunction is the only adequate remedy.¹

The owner of land through which a water-course runs is liable for obstructing the channel and turning the water from its channel upon adjacent land to its injury.² He is liable for storing the water by a dam and then discharging it in such quantities as to overflow the banks of the stream, and injuring the lands of a riparian owner below, and may be restrained by injunction.³

He is liable also for obstructing the channel and thereby throwing the water back upon the land of an upper proprietor.⁴

767. But an upper proprietor may drain his own land by ditches necessary to fit the lands for agricultural uses, if he does not throw

established and is thus expressed in the strongest authority in its favor, Penn. Coal Co. v. Sanderson, 113 Pa. St. 126, 'every man has the right to the natural use and enjoyment of his own property; and if while lawfully in such use and enjoyment without negligence, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*.' But this, as was shown in Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143, does not go beyond proper use and unavoidable damage. It was accordingly said in the latter case that 'the use which inflicts the damage must be natural, proper, and free from negligence, and the damage unavoidable. * * * Hence, the practical inquiry is, first, whether the damage was necessary and unavoidable; secondly, if not, was it sufficiently obvious to have been foreseen, and also preventable by reasonable care and expenditure?' See also Kankakee Drainage Dist. v. Lake Fork Special

Drainage Dist., 130 Ill. 261, 22 N. E. Rep. 607, reversing 29 Ill. App. 86.

¹ Davis v. Londgreen, 8 Neb. 43; Butler v. Peck, 16 Ohio St. 335, 88 Am. Dec. 452; Adams v. Walker, 34 Conn. 466, 91 Am. Dec. 742; Blakely v. Devine, 36 Minn. 53, 29 N. W. Rep. 342; Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50; Miller v. Laubach, 47 Pa. St. 154, 86 Am. Dec. 521; Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392.

² Palmer v. Waddell, 22 Kans. 352; Tuthill v. Scott, 43 Vt. 525, 5 Am. Rep. 301; Koch v. Delaware, L. & W. R. Co., 54 N. J. L. 401, 24 Atl. Rep. 442; Kay v. Kirk (Md.), 24 Atl. Rep. 326.

³ McKee v. Delaware & H. Canal Co., 125 N. Y. 353, 26 N. E. Rep. 305; Boyington v. Squires, 71 Wis. 276, 37 N. W. Rep. 227.

⁴ Ames v. Dorset Marble Co., 64 Vt. 10, 23 Atl. Rep. 857.

the water in great quantities upon an adjoining proprietor's lower land.¹ A landowner clearly has the right to drain surface water into a natural water-course that runs through his land, although he thereby increases the quantity of water running in the stream at times of high water, and diminishes the quantity in times of low water to the damage of a mill-owner lower down the stream.²

A landowner may collect the surface water of his land, and the water drawn from wells therein, into an artificial stream, and discharge the stream into a natural water-course running through his land, provided that this is done in the reasonable use of his land, and that the volume of water is not increased beyond the natural capacity of the water-course to discharge it, and the land of an adjoining owner is not thereby overflowed and materially injured.³

Every proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor. "Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless he is guilty of some act of negligence in the manner of its execution, he will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon or from the premises of the latter to his damage. The injury in such case is but a mere incident to the proper use of the owner's property; but if in the execution of the enterprise in hand he is guilty of negligence, which is the natural and proximate cause of injury to the adjoining proprietor, the law holds him accountable therefor."⁴

¹ *Ludeling v. Stubbs*, 34 La. Ann. 935; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. Rep. 53; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Davis v. Londgreen*, 8 Neb. 43; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. Rep. 350.

² *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479, affirming 58 Barb. 413; *Waffle v. New York Cent. R. Co.*, 53 N. Y. 11, 13 Am. Rep. 467; *Jenkins v. Wilmington & W. R. Co.*, 110 N. C. 438, 15 S. E. Rep. 193; *Treat v. Bates*, 27 Mich. 390; *Cumberland v. Willison*, 50 Md. 138; *Wheeler v. Worcester*, 10 Allen, 591; *Jackman v. Arlington Mills*, 137 Mass. 277; *Whitney v. Wilamette Bridge R. Co.*, 23 Oreg. 188, 31 Pac. Rep. 472; *Meixell v. Morgan*, 149

Pa. St. 415, 24 Atl. Rep. 216; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

³ *Jackman v. Arlington Mills*, 137 Mass. 277; *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Meixell v. Morgan*, 149 Pa. St. 415, 24 Atl. Rep. 216; *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Baltimore v. Appold*, 42 Md. 442; *McCormick v. Horan*, 81 N. Y. 86; *Waffle v. New York Cent. R. Co.*, 53 N. Y. 11, 13 Am. Rep. 467.

⁴ *Anheuser-Busch Brewing Asso. v. Peterson*, 41 Neb. 897, 904; *Beatrice v.*

768. One has a right to drain his land of surface water for any legitimate use. In several cases a distinction has been made that where an improvement of land was not made for the purpose of drainage, but drainage resulted as a mere incident from such improvement, the party is not liable for casting surface water on the lands of his neighbor, but where the improvement was made for the direct purpose of drainage, he is liable.¹

But the distinction thus made is not well founded. "One has a right to drain his land for any legitimate use, whether for a railroad track, a wheat field, or a pasture, and whether the improvement is directly and wholly for the purpose of drainage or whether it is for some other purpose, and such drainage is a mere incidental result. But if he collect and convey the surface water off his own land, he shall do what is reasonable under all the circumstances, to turn it into some natural drain, or into some course in which it will do the least injury to his neighbor, — and, if he would prevent it from coming upon his land, he must not do so by obstructing some natural drain, and thereby hold back the water and flood the land of his neighbor, at least if such natural drain is an important one."²

A drain or ditch established by the acquiescence of two adjoining landowners cannot be obstructed or abolished by the lower or servient owner alone without the consent of the upper or dominant owner, if the drain or ditch has been constructed in accordance with the natural flow of the water, and the quantity of the water has not been increased, nor its flow diverted by the owner of the higher land. The rights and duties of the original parties in such case pass to their grantees with the land.³

769. A landowner may, for the purpose of building upon his land or otherwise improving it, obstruct the flow of surface water upon it by raising the grade of his lands or turning back the natural flow of such water.⁴

Leary, 45 Neb. 149, 63 N. W. Rep. 370; Lincoln & B. H. R. Co. v. Sutherland, 44 Neb. 526; Willitts v. Chicago, B. & K. C. R. Co., 88 Iowa, 281, 55 N. W. Rep. 313; Hatch v. Vermont Cent. R. Co., 25 Vt. 49; Waterman v. Connecticut & P. Riv. R. Co., 30 Vt. 610, 73 Am. Dec. 326.

¹ Hogenson v. St. Paul, M. & M. R. Co., 31 Minn. 224, 17 N. W. Rep. 374; Olson v. St. Paul, M. & M. R. Co., 38

Minn. 419, 37 N. W. Rep. 953; Jordan v. St. Paul, M. & M. R. Co., 42 Minn. 172, 43 N. W. Rep. 849, 6 L. R. A. 573; Brown v. Winona & S. W. R. Co., 53 Minn. 259, 55 N. W. Rep. 123.

² Sheehan v. Flynn (Minn.), 61 N. W. Rep. 462, 26 L. R. A. 632, per Canty, J.

³ Vannest v. Fleming, 79 Iowa, 638, 44 N. W. Rep. 906, 18 Am. St. Rep. 387.

⁴ Bates v. Smith, 100 Mass. 181;

One of two adjoining lots was higher than the other, but there was no sufficient water shed to make a continuously running stream over the lower lot. Upon occasions of long continued rains and when the snow melted rapidly a stream was formed upon the surface of the lower lot. The owner of the upper lot built a house upon it, and afterwards the owner of the lower lot built upon that, using the earth excavated from the cellar to fill up around the foundation of the house. In consequence of this filling the ground of the lower lot was so raised that in wet times the water was thrown back upon the upper lot, causing injury to the buildings upon it. In an action to recover damages for such injury it was held that no recovery could be had, because, as a matter of law, there was no water-course, that this was not a question of fact for the jury, and that, there being no water-course, it was lawful for the defendant to improve his own lot without reference to the effect of the improvement upon his neighbor's lot and building.¹

The owner of land upon the slope of a hill running down to a mill-pond may cultivate and fertilize it in the ordinary way for garden purposes without becoming liable to the owner of the pond, which is encroached upon so as to diminish the water power by the large amount of solid matter thereby constantly carried into the pond by surface drainage.²

770. The rule of natural drainage from higher to lower lands, applicable to agricultural lands, does not apply to cities and towns. Thus in Pennsylvania it is well settled that in agricultural lands the natural flow of water from land which stands at a higher

Luther v. Winnisimmet Co., 9 Cush. 171; Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625; Bangor v. Lansil, 51 Me. 521; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Wagner v. Long Island R. Co., 2 Hun, 633; Vanderwiele v. Taylor, 65 N. Y. 341; Goodale v. Tuttle, 29 N. Y. 459; Raleigh & A. A. L. R. Co. v. Wicker, 74 N. C. 220; O'Brien v. St. Paul, 25 Minn. 333, 33 Am. Rep. 470; Hill v. Cincinnati, W. & M. R. Co., 109 Ind. 511, 10 N. E. Rep. 410; Cairo & V. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Hoehl v. Muscatine, 57 Iowa, 444, 10 N. W. Rep. 830; Bentz

v. Armstrong, 8 W. & S. 40, 43 Am. Dec. 265; Doerbaum v. Fischer, 1 Mo. App. 149.

See, however, Adams v. Walker, 34 Conn. 466, 91 Am. Dec. 742.

¹ Barkley v. Wilcox, 19 Hun, 320.

² Middlesex Company v. McCue, 149 Mass. 103, 105, 21 N. E. Rep. 230. "We are of opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may." Per Holmes, J.

level upon that which is at a lower level cannot, as a general rule, give cause for action. But the city lot-owner is permitted to form and regulate the surface of his lot as he pleases, taking care, however, not to produce any detriment or injury to his neighbor in the occupation or enjoyment of his lot. It is his duty in improving his lot to do it in such a way as to lead and conduct the water that happens to fall or be on it, into a sewer or other appropriate place for the receipt and discharge of the same and not suffer it to be turned or led upon an adjoining lot without the consent of the owner. This he is compelled to do even if obliged to carry it under or through his house or buildings.¹

771. The owner of a building allowing the water from the roof to fall upon the land or building of his neighbor is liable for the damage done,² although the damage is occasioned by the percolation of such water through the foundation wall of the adjoining building.³

The owner of an upper estate, on which he has erected a house, has no right to collect the waters which fall upon his roof into gutters, and from thence, by means of a conducting pipe, transfer and discharge them, although upon his own land, at such a place and in such a manner that, necessarily and inevitably, they are precipitated upon lower premises in an unnatural, unusual, and injurious volume and quantity.⁴ "I have always understood," said Lord Justice James, "that everybody has a right on his own land to do anything with regard to the diversion of water, or the storage of water, or with regard to the usage of water, in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it as he is minded to make, he is not to

¹ Davidson v. Sanders, 1 Super. Ct. (Pa.), 432; Meixell v. Morgan, 149 Pa. St. 415, 24 Atl. Rep. 216; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. Rep. 453; Sentner v. Tees, 132 Pa. St. 216, 18 Atl. Rep. 1114; Young v. Leedom, 67 Pa. St. 351; Martin v. Riddle, 26 Pa. St. 415; Kauffman v. Greisemer, 26 Pa. St. 407, 67 Am. Dec. 437; Bentz v. Armstrong, 8 W. & S. 40, 42 Am. Dec. 265.

² Penruddock's Case, 5 Coke Rep. 100b; Baten's Case, 9 Coke Rep. 53b; Tucker v. Newman, 11 A. & E. 40; Harris v. De Pinna, 33 Ch. D. 238, 260; Conner v. Woodfill, 126 Ind. 85, 25 N.

E. Rep. 876; Beach v. Gaylord, 43 Minn. 476, 45 N. W. Rep. 1095. See Hurdman v. North Eastern R. Co., 3 C. P. D. 168, 174, as to damage by percolation.

³ Bellows v. Sackett, 15 Barb. 96. The particular injury in this case was occasioned by defendants' eave trough or gutter having become so old and leaky that it did not carry off the water as formerly, but the water ran through the trough or gutter near its center, and fell to the ground in the narrow space between the buildings.

⁴ Beach v. Gaylord, 43 Minn. 476, 45 N. W. Rep. 1095.

allow or cause that water to go upon his neighbor's land so as to affect that neighbor's land in some other way than the way in which it had been affected before. That is the common use of water. A man receives the rain water from his roof, he does not allow it to settle upon the surface, but he receives it on his roof, and collects it into the pipes, and then lets it go down upon his own land, and from his own land it gets into his neighbor's land."¹

772. A railroad company which has obstructed the natural flow of surface water by an embankment is liable if the road was not properly constructed with a due regard to the rights of adjacent owners, and whether the road was so constructed is a question for the jury.² The company is not liable for an obstruction incident to a proper construction and use of its property. Therefore, in an action for damages to plaintiff's lands, resulting from an overflow, caused by defendant's railroad embankment, and an insufficient culvert over a stream, it is error to charge that plaintiff had the right to have the waters, whether rain water or spring water, flow as they naturally would have flowed, without any obstruction by the railroad. It is not the duty of a railroad company to so construct its roadbed as to provide against all except unprecedented overflows, or to preserve adjacent lands from overflows that they were subject to in their natural state. If it may reasonably be supposed that a railroad properly constructed will subject adjoining land to overflow, or obstruct its drainage, such damages should be estimated and allowed in the condemnation proceedings, and it is to be presumed that they were considered and allowed.³

¹ West Cumberland I. & S. Co. v. Kenyon, 11 Ch. D. 782, 786.

² Illinois Cent. R. Co. v. Wilbourn (Miss.), 21 So. Rep. 1; Yazoo & Miss. Val. R. Co. v. Davis, 73 Miss. 678, 19 So. Rep. 487; Sinai v. Louisville, N. O. & T. R. Co., 71 Miss. 547, 14 So. Rep. 87; Kansas City, M. & B. R. Co. v. Lackey, 72 Miss. 881, 16 So. Rep. 909; Illinois Cent. R. Co. v. Miller, 68 Miss. 760, 10 So. Rep. 61; Mississippi & T. R. Co. v. Archibald, 67 Miss. 38, 7 So. Rep. 212, 41 Am. & Eng. R. Cas. 4; Ohio & Miss. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. Rep. 279; Brou-

sard v. Sabine & E. T. R. Co., 80 Tex. 329, 16 S. W. Rep. 30.

³ Yazoo & Miss. Val. R. Co. v. Davis, 73 Miss. 678, 19 So. Rep. 487; Richardson v. Levee Commissioners, 68 Miss. 539, 9 So. Rep. 351; Ohio & Miss. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. Rep. 279; Bell v. Norfolk So. R. Co., 101 N. C. 21, 7 S. E. Rep. 467; Clark v. Hannibal & St. J. R. Co., 36 Mo. 202; Jones v. St. Louis, I. M. & S. R. Co., 84 Mo. 151; Moss v. St. Louis, I. M. & S. R. Co., 85 Mo. 86; Barnes v. Mich. Air L. R. Co., 65 Mich. 251, 32 N. W. Rep. 426; Morrissey v.

773. A railroad company may erect a solid embankment and stop the flow of surface water in those States in which an individual is allowed to do the same thing.¹ A railroad company has the same right as an individual to divert or to obstruct the flow of surface water.² “No exception is shown to the general rule by the fact that the party raising the embankment is a railroad corporation, and the embankment raised upon its right of way for use as a railroad track, nor by the fact that a culvert could have been placed in such embankment sufficient to have afforded an outlet for all such surface water, nor by the fact that a culvert was placed therein insufficient to afford such outlet.”

But although a railroad company has the right to erect an embankment without providing culverts for the escape of surface water, it should observe the rule that one must use his own so as not to injure his neighbor; and therefore a railroad company should be reasonably prudent and careful to avoid injury by embankments which are liable to set back the surface water.³

Chicago, B. & Q. R. Co., 38 Neb. 406; Lincoln & B. H. R. Co. v. Sutherland, 44 Neb. 526, 62 N. W. Rep. 859; Bunder-son v. Burlington & M. R. Co., 43 Neb. 545; Anheuser-Busch Brewing Asso. v. Peterson, 41 Neb. 897; Beatrice v. Leary, 45 Neb. 149, 63 N. W. Rep. 370; Hill v. Cincinnati, W. & M. R. Co., 109 Ind. 511, 10 N. E. Rep. 410; Gilbert v. Savannah, G. & N. A. R. Co., 69 Ga. 396.

¹Cassidy v. Old Colony R. Co., 141 Mass. 174, 5 N. E. Rep. 142; Greeley v. Maine Central R. Co., 53 Me. 200; Morrison v. Bucksport & B. R. Co., 67 Me. 353; Chicago, K. & N. W. R. Co. v. Steck, 51 Kans. 737; Atchison, T. & S. F. R. Co. v. Hammer, 22 Kans. 763, 31 Am. Rep. 216; Brown v. Winona & S. W. R. Co., 53 Minn. 259, 55 N. W. Rep. 123; Jordan v. St. Paul, M. & M. R. Co., 42 Minn. 172, 43 N. W. Rep. 849, 6 L. R. A. 573; O'Connor v. Fond Du Lac, A. & P. R. Co., 52 Wis. 526, 9 N. W. Rep. 287, 38 Am. Rep. 754; Hanlin v. Chicago & N. W. R. Co., 61 Wis. 515, 21 N. W. Rep. 623; Cairo &

V. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Hill v. Cincinnati, W. & M. R. Co., 109 Ind. 511, 10 N. E. Rep. 410.

²Atchison, T. & S. Fe R. Co. v. Hammer, 22 Kans. 763, 765, 31 Am. Rep. 216, per Brewer, J.; Chicago, K. & N. R. Co. v. Steck, 51 Kans. 737; Missouri P. R. Co. v. Renfro, 52 Kans. 237; Jordan v. St. Paul, M. & M. R. Co., 46 Minn. 172, 43 N. W. Rep. 849; Henderson v. Minneapolis, 32 Minn. 319, 20 N. W. Rep. 322; Hannaher v. St. Paul, M. & M. R. Co., 5 Dak. 1, 37 N. W. Rep. 717; Abbott v. Kansas City, St. Jo. & C. B. R. Co., 83 Mo. 271, 53 Am. Rep. 581; Field v. Chicago R. I. & P. R. Co., 76 Mo. 614; Johnson v. Chicago, St. P. M. & O. R. Co., 80 Wis. 641, 50 N. W. Rep. 771; Lessard v. Stram, 62 Wis. 112, 22 N. W. 284; Hanlin v. Chicago & N. W. R. Co., 61 Wis. 515, 21 N. W. Rep. 623.

³Rowe v. St. Paul, M. & M. R. Co., 41 Minn. 384, 43 N. W. Rep. 76; Hoshier v. Kansas City, St. J. & C. B. R. Co., 60 Mo. 329.

A railroad company which, for the purpose of properly constructing its roadbed, takes earth from one part of its premises and uses it upon the roadbed, thus leaving an excavation or ditch on each side of it, for a number of miles through low and wet land, with several culverts from the embankment, in consequence of which considerable quantities of water are carried through the culverts and run over lands of other persons, — is not liable for injuries occasioned by such surface water, although except for such ditch and culverts it would not have been thrown on such land,¹

774. But on the other hand it is in many cases held that a railroad company has no right to obstruct the natural flow of water by an embankment, or other artificial means, or by the collection of it into an artificial channel, to force or conduct it to a discharge upon the lands of another, any more than it has in the same way to dispose of water from water courses; and that it is as liable for the resulting damage in the one case as in the other.² “A company having a right to construct its railroad may not, in disregard of the

¹ *Jordan v. St. Paul, M. & M. R. Co.*, 42 Minn. 172, 43 N. W. Rep. 849, 6 L. R. A. 573, 41 Am. & Eng. R. Cas. 1.

² *Whalley v. Lancashire & Y. R. Co.*, 13 Q. B. D. 131; *Savannah, Americus & M. R. v. Buford*, 106 Ala. 303, 312, per *Brickell, C. J.*; *Olson v. St. Paul, M. & M. R. Co.*, 38 Minn. 419, 37 N. W. Rep. 953, 34 Am. & Eng. R. Cas. 152, *Chicago & A. R. Co. v. Willi*, 53 Ill. App. 603; *Toledo, W. & W. R. Co. v. Morrison*, 71 Ill. 616; *Jacksonville, North W. & S. E. R. Co. v. Cox*, 91 Ill. 500; *East St. Louis & C. R. Co. v. Eisentraut*, 34 Ill. App. 563, 134 Ill. App. 96, 24 N. E. Rep. 760; *Cornish v. Chicago, B. & Q. R. Co.*, 49 Iowa, 378; *Mitchell v. New York, L. E. & W. R. Co.*, 36 Hun, 177; *Philadelphia Wilmington & B. R. Co. v. Davis*, 68 Md. 281, 6 Am. St. Rep. 440; *Carriger v. East Tennessee, V. & G. R. Co.*, 7 Lea, 388; *Louisville & N. R. Co. v. Hays*, 11 Lea, 382, 47 Am. Rep. 291; *Railway Co. v. Mossman*, 90 Tenn. 157, 25 Am. St. Rep. 670; *Little Rock R. Co. v. Chapman*, 39 Ark. 463; *Cur-*

tis v. Eastern R. Co., 98 Mass. 428, 14 Allen, 55; *Waterman v. Conn. & P. Riv. R. Co.*, 30 Vt. 610, 73 Am. Dec. 326; *Weed v. St. Johnsbury & L. C. R. Co.*, 64 Vt. 52, 24 Atl. Rep. 361; *Benson v. Chicago & A. R. Co.*, 78 Mo. 504; *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431; *Indianapolis, B. & W. R. Co. v. Smith*, 52 Ind. 428; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138, 40 N. W. Rep. 948; *Austin & N. W. R. Co. v. Anderson*, 79 Tex. 427, 15 S. W. Rep. 484; *Gulf, C. & S. F. R. Co. v. Donahoo*, 58 Tex. 129; *Galveston, H. & S. A. R. Co. v. Tait*, 63 Tex. 223; *Gulf, C. & S. F. R. Co. v. Helsley*, 62 Tex. 593; *Cincinnati, H. & D. R. Co. v. Ahr*, 2 Cin. (O.) Supr. 504; *Illinois, Cent. R. Co. v. Miller*, 68 Miss. 760, 10 So. Rep. 61.

Many of the cases in this note were decided under the civil-law rule; and the cases decided under the common-law rule are exceptional in circumstances, as where the water is collected and discharged in unusual quantities upon the adjoining land.

rights of adjoining proprietors, so construct its roadbed as to destroy the value of the lands of third persons, even though the injury be occasioned by turning back surface water upon such lands, if, with due regard to the duty it owes to the public, and in the reasonable use of its own property, and at no undue expense, it can, by putting in trestles, culverts, or other openings, provide a way through which such water may safely be allowed to escape. But that is not this case. On the contrary, to require the company to refrain from building its roadway by putting up embankments necessary to raise its line above the periodical floods, when large and numerous trestles are provided to give vent to the surrounding waters, would be to subordinate its rights of property to the unfounded demands of the adjoining owner, who has already received full compensation for the injury of which he complains."¹

A railroad company which diverts the water of one stream into another above its track for the purpose of saving the expense of constructing trestles, and the lands above and below are in consequence flooded to the injury of the owners, is liable for the resulting injury.² The company is required to take proper precautions in the construction of its roads to prevent injury to other landowners from the overflow of a water-course which it has diverted.³

775. A municipal corporation has no greater right than a natural person to divert surface water in large quantities by an artificial channel upon the land of another, except that it may do this in the exercise of the right of eminent domain, upon the payment of full compensation as required by the Constitution.⁴ If the corporation,

¹ Yazoo & Miss. Val. R. Co. v. Davis, 73 Miss. 678, 694, 19 So. Rep. 487, per Cooper, C. J. See also Coleman v. Kansas City, St. J. & C. B. R. Co., 36 Mo. App. 476; McCleneghan v. Omaha & R. V. R. Co., 25 Neb. 523, 41 N. W. Rep. 350; Emery v. Raleigh & G. R. Co., 102 N. C. 209, 9 S. E. Rep. 139.

² Adams v. Durham & N. R. Co., 110 N. C. 325, 14 S. E. Rep. 857.

³ McCormick v. Kansas City, St. J. & C. B. R. Co., 70 Mo. 359; Mellen v. Western R. Co., 4 Gray, 301.

⁴ Arn v. Kansas, 14 Fed. Rep. 236.

Alabama: Troy v. Coleman, 58 Ala. 570; Eufalia v. Simmons, 86 Ala. 515, 6 So. Rep. 47.

California: Stanford v. San Francisco, 111 Cal. 198, 43 Pac. Rep. 605.

Georgia: Phinizy v. Augusta, 47 Ga. 260.

Illinois: Aurora v. Love, 93 Ill. 521; Elgin v. Kimball, 90 Ill. 356; Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; Palmer v. O'Donnell, 15 Ill. App. 324; Young v. Highw. Com'rs, 134 Ill. 569, 25 N. E. Rep. 689; Stack v. East St. Louis, 85 Ill. 377; Stoddard v. Filgur, 21 Ill. App. 560.

Indiana: Davis v. Crawfordsville, 169 Ind. 1, 21 N. E. Rep. 449; Sullivan v. Phillips, 110 Ind. 320, 11 N. E. Rep. 300; Rice v. Evansville, 108 Ind. 7, 9 N. E. Rep. 139, 58 Am. Rep. 22;

by its system of drainage, collects a large body of surface water in one place, it must provide for its escape without injury to private property.¹

776. A municipal corporation is not liable for turning back or diverting surface water from the land adjoining in consequence of lawfully raising the grade of a street, or otherwise obstructing the

Vincennes v. Richards, 23 Ind. 381; Princeton v. Gieske, 93 Ind. 102; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; North Vernon v. Voegler, 89 Ind. 77; Patoka Twp. v. Hopkins, 131 Ind. 142, 30 N. E. Rep. 896.

Iowa: Russell v. Burlington, 30 Iowa, 262.

Maine: Plummer v. Sturtevant, 32 Me. 325.

Massachusetts: Turnerv. Dartmouth, 13 Allen, 291; Haskell v. New Bedford, 108 Mass. 208; Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470; Nealley v. Bradford, 145 Mass. 561, 14 N. E. Rep. 652; Rathke v. Gardner, 134 Mass. 14; Bates v. Westborough, 151 Mass. 174, 182, 23 N. E. Rep. 1070, 7 L. R. A. 156.

Michigan: Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Pennoyer v. Saginaw, 8 Mich. 534; Pontiac v. Carter, 32 Mich. 164; Rice v. Flint, 67 Mich. 401, 34 N. W. Rep. 719.

Minnesota: O'Brien v. St. Paul, 25 Minn. 333, 33 Am. Rep. 470; Kobs v. Minneapolis, 22 Minn. 159; Lee v. Minneapolis, 22 Minn. 13; Follman v. Mankato, 45 Minn. 457, 48 N. W. Rep. 192; Pye v. Mankato, 36 Minn. 373, 31 N. W. Rep. 863; Blakely v. Devine, 36 Minn. 53, 29 N. E. Rep. 342.

Missouri: Rychlicki v. St. Louis, 98 Mo. 497, 11 S. W. Rep. 1001, 4 L. R. A. 594.

New Jersey: Hamilton v. Wainwright (N. J. Eq.), 29 Atl. Rep. 200; Soule v. Passaic, 47 N. J. Eq. 28, 20 Atl. Rep. 346; Miller v. Morristown, 47 N. J. Eq. 62; 20 Atl. Rep. 61; Field v. West Orange, 36 N. J. Eq. 118, 37 N. J. Eq.

600; Slack v. Lawrence (N. J. Eq.), 19 Atl. Rep. 663; Field v. West Orange, 46 N. J. Eq. 183, 2 Atl. Rep. 236.

New York: Seifert v. Brooklyn, 101 N. Y. 136, 142, 54 Am. Rep. 664; Rutherford v. Holley, 105 N. Y. 632, 11 N. E. Rep. 818; Ashberry v. West Seneca, 58 Hun, 602, 33 N. Y. St. Rep. 431; Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540; Byrnes v. Cohoes, 67 N. Y. 204; Sleight v. Kingston, 11 Hun, 594; Bastable v. Syracuse, 8 Hun, 587, 72 N. Y. 64; Moran v. McClearns, 63 Barb. 185.

Ohio: Rhodes v. Cleveland, 10 Ohio, 159, 36 Am. Dec. 82.

Pennsylvania: Krug v. St. Mary's Borough, 152 Pa. St. 37, 25 Atl. Rep. 162; Weir v. Plymouth, 148 Pa. St. 566, 24 Atl. Rep. 94; Bohan v. Avoca, 154 Pa. St. 404, 26 Atl. Rep. 604; West Bellevue v. Huddleston, 23 W. N. C. 240; Torrey v. Scranton, 133 Pa. St. 173, 19 Atl. Rep. 351.

Rhode Island: Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520.

Vermont: Whipple v. Fairhaven, 63 Vt. 221, 21 Atl. Rep. 533.

Virginia: Smith v. Alexandria, 33 Gratt. 208.

West Virginia: Gillison v. Charleston, 16 W. Va. 282, 37 Am. Rep. 763.

Wisconsin: Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473.

¹ Crawfordsville v. Bond, 96 Ind. 236; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; North Vernon v. Voegler, 89 Ind. 77.

flow of such water not running in a natural channel by any careful work of improvement.¹

The rule is otherwise in some States in which the civil law doctrine that the lower estate owes a servitude to the upper to receive the surface drainage.²

A town is under no obligation to keep open and unobstructed a culvert across the roadway constructed for highway purposes in order to accommodate surface water occasionally flowing from adjoining land; and therefore it is not liable to the owner of such land for permitting such culvert to become obstructed so that the surface water is set back upon his land.³ It is not liable for constructing a culvert in such a way as to carry the water along its natural or ancient course, without increasing its quantity.⁴

777. But a town has no right to extend a drain or culvert beyond the limits of a highway and conduct the water or drainage upon the adjoining land; and the owner of such land may erect such a structure as he pleases up to the line of his land, to keep the water from his land.⁵

¹ Keith v. Brocton, 136 Mass. 119; Hubbard v. Webster, 118 Mass. 599; Turner v. Dartmouth, 13 Allen, 291; Flagg v. Worcester, 13 Gray, 601; Emery v. Lowell, 104 Mass. 13; Wakefield v. Newell, 12 R. I. 75, 34 Am. Rep. 598; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Lynch v. New York, 76 N. Y. 60, 32 Am. Rep. 271; Acker v. New Castle, 48 Hun, 312; Waters v. Bay View, 61 Wis. 642, 21 N. W. Rep. 811; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; Damour v. Lyons City, 44 Iowa, 276; Freburg v. Davenport, 63 Iowa, 119, 18 N. W. Rep. 705, 50 Am. Rep. 737; Morris v. Council Bluffs, 67 Iowa, 343, 25 N. W. Rep. 274, 56 Am. Rep. 343; Imler v. Springfield, 55 Mo. 119; Stewart v. Clinton, 79 Mo. 603; Bush v. Portland, 19 Oreg. 45, 23 Pac. Rep. 667; Corcoran v. Benicia, 96 Cal. 1, 31 Am. St. Rep. 171, 30 Pac. Rep. 798; Miller v. Morristown, 47 N. J. Eq. 62, 20 Atl. Rep. 61; Field v. West Orange, 46 N. J. Eq. 183, 2 Atl. Rep. 236; Bush

v. Portland, 19 Oreg. 45, 23 Pac. Rep. 667; Alden v. Minneapolis, 24 Minn. 254; Roll v. Augusta, 34 Ga. 326; Chadeayne v. Robinson, 55 Conn. 345, 11 Atl. Rep. 592; Gross v. Lampasas, 74 Tex. 195, 11 S. W. Rep. 1086.

² Stack v. East St. Louis, 85 Ill. 377, 28 Am. Rep. 619; Shawneetown v. Mason, 82 Ill. 337, 25 Am. Rep. 321; Bloomington v. Brokaw, 77 Ill. 194; Kemper v. Louisville, 14 Bush, 87; Smith v. Alexandria, 33 Gratt. 208; Bowman v. New Orleans, 27 La. Ann. 501.

³ Byrne v. Farmington, 64 Conn. 367, 30 Atl. Rep. 138; Waters v. Bay View, 61 Wis. 642, 21 N. W. Rep. 811; Atchison v. Challiss, 9 Kans. 603; Alden v. Minneapolis, 24 Minn. 254; Union v. Durkes, 38 N. J. L. 21; Gould v. Booth, 66 N. Y. 62. See, however, Buchanan v. Duluth, 40 Minn. 402, 42 N. W. Rep. 204; Eufaula v. Simmons, 86 Ala. 515, 6 So. Rep. 47.

⁴ Noble v. St. Albans, 56 Vt. 522.

⁵ Franklin v. Fisk, 13 Allen, 211, 90 Am. Dec. 194; Whipple v. Fair Haven,

Where an expensive viaduct was constructed by the city, which, with the knowledge, acquiescence, and oral consent of the owner, extended a few inches over upon his property, where it was maintained for about five years before complaint was made, it was held that such owner was estopped from claiming exclusive possession of the ground so occupied, or from interfering with the maintenance of such structure.¹

778. A town or city is not liable for damages done by surface water running down a street in large quantities. No responsibility exists for grading or improving public streets, so far as surface water from them may occasion any injury.² A town is not liable for so repairing a highway and constructing water bars within its limits as to cause the surface water to flow in large quantities upon the land of an adjoining owner.³ Nor is a town liable for damages done by surface water flowing through dams and culverts constructed within the limits of the highway, and then turning upon the land of an adjoining owner.⁴

63 Vt. 221, 21 Atl. Rep. 533; *Cauble v. Hultz*, 118 Ind. 13, 20 N. E. Rep. 515.

¹ *Parker v. Atchison* (Kans.), 48 Pac. Rep. 631.

² *Collins v. Waltham*, 151 Mass. 196, 24 N. E. Rep. 327. In *Collins v. Waltham*, *supra*, surface water accumulating in open gutters in various city streets flowed thence into a connecting street, the whole series of streets being substantially at the grade of the surrounding land, and, overflowing the gutters of the connecting street, passed over intervening land and flooded the land beyond to the owner's injury. There was a drain in the connecting street, the effect of which was to relieve such a flood somewhat, but the inlet was sometimes stopped up. It was held that the city was not liable in damages to such landowner. *Holmes, J.*, said: "If a city or town is ever liable to an action for injury done to a land holder by diverting surface water and causing it to flow upon his land when it is done in constructing or repairing a highway, there is nothing

stated sufficient to distinguish the case at bar from *Flagg v. Worcester*, 13 Gray, 601, and *Turner v. Dartmouth*, 13 Allen, 291, explained in *Emery v. Lowell*, 104 Mass. 13; *Brayton v. Fall River*, 113 Mass. 218; *Kennison v. Beverly*, 146 Mass. 467, 16 N. E. Rep. 278; *Benjamin v. Wheeler*, 8 Gray, 409, 15 Gray, 486; *Bates v. Westborough*, 151 Mass. 174, 23 N. E. Rep. 1070." *Union v. Durkes*, 38 N. J. L. 21; *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. Rep. 61; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22; *Heth v. Fond du Lac*, 63 Wis. 228, 23 N. W. Rep. 495; *Champion v. Cranston*, 84 Wis. 405, 19 L. R. A. 856.

³ *Collins v. Waltham*, 151 Mass. 196, 24 N. E. Rep. 327; *Turner v. Dartmouth*, 13 Allen, 291; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

⁴ *Flagg v. Worcester*, 13 Gray, 601; *Hamilton v. Wainwright* (N. J. Eq.), 29 Atl. Rep. 200; *Dickinson v. Worcester*, 7 Allen, 19; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

779. A town is bound to make its highways safe and convenient for travelers, and its officers are protected in doing so long as they act within the scope of their authority, and are not bound to submit the propriety of their judgment to the supervision of a court or jury.¹

The pollution of a stream by the discharge into it of surface water with the usual impurities from streets does not afford a cause of action at common law.²

V. *Rights as to Percolating and Subterranean Water.*

780. There are no correlative rights between the owners of adjoining lands with reference to water percolating beneath the surface of the ground,³ or rising upon the lands in springs, until the springs form a water-course with a well defined channel.⁴ Such water belongs absolutely to the owner of the land. "The secret, changeable, and uncontrollable character of underground water, in its operations, is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams. Their nature is defined, and their progress over the surface may be seen and known, and is uniform. They are not in the earth and a part of it, and no secret influences move them, but they assume a distinct character from that of the earth, and become subject to a certain law, — the great law of gravitation."⁵

781. Water which percolates through the soil belongs to the owner of the land, who may divert it or appropriate it for the benefit of his land without being liable in any way to the adjoining proprietor, however great the injury to him may be.⁶ The rights of the parties in such cases are not governed by the law which applies

¹ Turner v. Dartmouth, 13 Allen, 291; Benjamin v. Wheeler, 8 Gray, 409.

² Bainard v. Newton, 154 Mass. 255, 27 N. E. Rep. 995.

³ Chatfield v. Wilson, 28 Vt. 49; Frazier v. Brown, 12 Ohio St. 294.

⁴ Harwood v. West Randolph, 64 Vt. 41, 24 Atl. Rep. 97; Smith v. Adams, 6 Paige, 435.

⁵ Chatfield v. Wilson, 28 Vt. 49, 54, per Bennett, J.

⁶ Chasemore v. Richards, 5 H. & N. 982; Ballard v. Tomlinson, 29 Ch. D. 115; Roath v. Driscoll, 20 Conn. 533,

52 Am. Dec. 352; Springfield Water Works Co. v. Jenkins, 62 Mo. App. 74; Greenleaf v. Francis, 18 Pick. 117; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Chatfield v. Wilson, 28 Vt. 49; Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. Rep. 433; Ellis v. Duncan, 21 Barb. 230; Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Whetstone v. Bowser, 29 Pa. St. 59; Buffum v. Harris, 5 R. I. 243.

to rivers and flowing streams, but are rather within that principle, as declared by Chief Justice Tindal, "which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his own free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action."¹

In New Hampshire, however, a landowner is regarded as having not the full and absolute ownership of water percolating through his land, but a qualified ownership only; and the qualification is that he must use his own property so as not to injure his neighbor. "If the landowner has the absolute and unqualified ownership of all such water in or upon his land, his neighbor, by digging or otherwise, has no more right to take away his property water than his property sand. If, as respects the soil, he may dig as he pleases, he is still in general limited by the rule that in digging he must not take away his neighbor's soil by effectually removing its natural supports. * * * If the water, not gathered into natural water-courses, belongs absolutely to the owner of the land, because it is part of the soil, and for that reason only, it must be subject to the same law as the other components of the soil, the sand, loam and rock; which may not ordinarily be removed by an adjacent owner by the withdrawal of their natural supports; for the maxim from which such ownership is deduced, when applied without qualification, as it must be to lead to this conclusion, allows no sound distinction."² The conclusion to be drawn from the decisions in this State, is, that in respect to water not gathered into a stream, but circulating through the pores of the earth, beneath its surface, a landowner, who, in the reasonable use of his own land, obstructs or diverts the flow of such water even to the injury of his neighbor's land, is not liable to respond in damages. What, in any particular case, is a

¹ *Acton v. Blundell*, 12 M. & W. 324, 354. The distinction between surface water and subterranean water is said to have been first made and acted upon in this case. *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282, 301.

² *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569, 574, 82 Am. Dec. 179, per Bartlett, J.

reasonable use is ordinarily a mixed question of law and fact, to be submitted to the jury under the instruction of the court. The same rule is applied to the use of surface water not gathered into a stream.¹

782. One may dig a well or make any excavation on his own land for purposes connected with its use though he thereby destroys a well or spring on his neighbor's lands, by cutting off or diverting underground waters which had before percolated through his land to his neighbor's land.² "In the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time; it may well be that it is only yesterday's date that they first took the course and direction which enabled them to supply the well. Again, no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk,

¹ Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276. See also Wabash & E. Canal v. Spears, 16 Ind. 441, 79 Am. Dec. 444.

² Bradford v. Pickles, L. R. [1895], App. Cas. 587; Acton v. Blundell, 12 M. & W. 324; Ballacorkish Silver L. & C. Min. Co. v. Harrison, L. R. 5 P. C. 49; Broadbent v. Ramsbotham, 11 Exch. 602; Rawston v. Taylor, 11 Exch. 369; Chasemore v. Richards, 2 H. & N. 168, 7 H. L. Cas. 349; New River Co. v. Johnson, 2 El. & El. 435; Regina v. Metropolitan Board, 3 B. & S. 710; Hodgkinson v. Ennor, 4 B. & S. 229; Greenleaf v. Francis, 18 Pick. 117; Parker v. Boston & M. R. Co., 3 Cush. 107, 50 Am. Dec. 709; Ætna Mills v. Brookline, 127 Mass. 69; Davis v. Spaulding, 157 Mass. 431, 434, 32 N. E. Rep. 650; Ocean Grove C. M. Asso. v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. Rep. 168; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Brown v. Illius, 25 Conn. 583; Chase v. Silverstone, 62

Me. 175, 16 Am. Rep. 419; Chesley v. King, 74 Me. 164, 43 Am. Rep. 569; Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. Rep. 433; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100, 50 Barb. 316; Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 157; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Frazier v. Brown, 12 Ohio St. 294; Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Coleman v. Chadwick, 80 Pa. St. 81, 21 Am. Rep. 93; Trout v. McDonald, 83 Pa. St. 144; Chatfield v. Wilson, 28 Vt. 49; Clark v. Conroe, 38 Vt. 469; Harwood v. Benton, 32 Vt. 724; Mosier v. Caldwell, 7 Nev. 363; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Huston v. Leach, 53 Cal. 262; New Albany & S. R. Co. v. Peterson, 14 Ind. 112, 77 Am. Dec. 60; Taylor v. Welch, 6 Oreg. 198, 200.

and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all.”¹

But the destruction of a well or spring by a person or corporation required to make compensation for consequential injuries under constitutional provisions, is a proper element of damages; as in case such destruction arises from the grading of a railroad track;² or from the erection of a gas-house on the adjoining land,³ or from the construction of a sewer by a town under a statute providing for compensation for injuries to property.⁴

783. This is the rule, although the motive of the landowner was not to use the water but to injure his neighbor into whose land the water would naturally flow.⁵ In a recent case before the House of Lords, Lord Halsbury, L. C., said: “This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your lordships seem to me to be absolutely irrelevant. * * * It is not an uncommon thing to stop up a path which may be a convenience to everybody else, and the use of which may be no inconvenience to the owner of the land over which the path goes. But when the use of it is insisted upon as a right, it is a familiar mode of testing that right to stop the permissive use, which the owner of the land would contend it to be, although the use may form no inconvenience to the owner. So, here, if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which would otherwise go into the possession of this trading company, I see no reason why he should not insist on

¹ Acton v. Blundell, 12 M. & W. 324, 350, per Tindal, C. J.

² Parker v. Boston & M. R. Co., 3 Cush. 107, 50 Am. Rep. 709.

³ Ottawa Gas Light Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263.

⁴ Trowbridge v. Brookline, 144 Mass. 139, 10 N. E. Rep. 796.

⁵ Bradford v. Pickles, L. R. [1895], A. C. 587; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373; Chatfield v. Wilson, 28 Vt. 49. *Contra*, see

Greenleaf v. Francis, 18 Pick. 117; Walker v. Cronin, 107 Mass. 555, 564, commented upon in Chesley v. King, 74 Me. 164, 43 Am. Rep. 569; Redman v. Forman, 83 Ky 214; Wyandot Club v. Sells, 4 Ohio Dec. 254; Springfield Water Works Co. v. Jenkins, 62 Mo. App. 74; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511.

their purchasing his interest from which this trading company desires to make profit.”¹ In the same case Lord Ashbourne said: “Mr. Pickles has acted within his legal rights throughout; and is he to forfeit those legal rights and be punished for their legal exercise because certain motives are imputed to him? If his motives were the most generous and philanthropic in the world, they would not avail him when his actions were illegal. If his motives are selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal.” And Lord Macnaghten said: “It is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.”

784. A grant of a right to draw water from a spring or well does not preclude the grantee from cutting the water from such spring or well by digging a well on his own land. A grant of an easement to draw water from a well by a pipe laid in the ground, as used at the time of the grant, the water flowing through it by gravitation, does not preclude the grantee from digging another well on his own land, although the result may be to destroy the value of the easement by diversion of the water which formerly percolated into the well.²

The owner of a mine by reason of his mining operations, is not liable to the owner of the surface lands for drawing off the surface water or water which would have flowed into the wells and springs of the surface land.³

A railroad company which has purchased a right of way over and through the grantor's land, for all purposes connected with the construction, use, and occupation of its road, has the right to dig a well upon such right of way, and to use the water supplied by percolation, although such use may materially diminish the supply of water in a spring upon the grantor's land.⁴

¹ Bradford v. Pickles [1895], A. C. 587, 594.

² Davis v. Spaulding, 157 Mass. 431, 32 N. E. Rep. 650, 19 L. R. A. 102; Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 157; Lybe's App., 106 Pa. St. 626, 51 Am. Rep. 542. See, however, Paine v. Chandler, 134 N. Y. 385, 32 N. E. Rep. 18, 19 L. R. A. 99.

³ Ballacorkish Mining Co. v. Harrison, L. R. 5 P. C. 49; Trout v. McDonald, 83 Pa. St. 144; Coleman v. Chadwick, 80 Pa. St. 81, 21 Am. Rep. 93.

⁴ Hougau v. Milwaukee & St. P. R. Co., 35 Iowa, 558, 14 Am. Rep. 502. And see Chamberlain v. Baltimore & O. R. Co., 66 Md. 518, 8 Atl. Rep. 267.

785. One has no right to draw water from a stream or pond by percolation to the injury of a riparian owner. The owner of a mill on the banks of a river cannot maintain an action against a land-owner, who sinks a deep well on his own land and by pumps and steam engine diverts the underground water which would otherwise have percolated the soil and flowed into the river by which, for more than sixty years, the mill had been worked.¹

But the mill-owner may maintain an action for a diversion of water from a stream which feeds his mill-pond, if it appears that the water is diverted by percolation after it has become a part of the running stream, though he cannot recover for intercepting underground springs or for diverting water which is merely drained from the soil by percolation.² "If," said Lord Hatherley, L. C., "you are simply using what you have a right to use, and leaving your neighbor to use the rest of the water as it flows on, you are entitled to do so; but you must not appropriate that which you have no right to appropriate to yourself. In this case there is, *ex concessis*, a defined channel in which this water was flowing, and I think the evidence is clear that some of it is withdrawn by the drain which the local board have made. As far as regards the support of the water, all one can say is this — I do not think *Chasemore v. Richards*, or any other case, has decided more than this — that you have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbors also, who have a clear right to use it, and have it come to them unimpaired in quality and undiminished in quantity."³

¹ *Chasemore v. Richards*, 2 H. & N. 168, 7 H. L. Cas. 349, overruling on this point *Dickinson v. Grand Junction Canal*, 7 Ex. 282; *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. Rep. 179.

² *Covert v. Brooklyn*, 6 App. Div. (N. Y.) 73, 39 N. Y. Supp. 744; *Covert v. Crawford*, 141 N. Y. 521; *Van Wyck-*

len v. Brooklyn, 118 N. Y. 427, 24 N. E. Rep. 179; *Emporia v. Soden*, 25 Kans. 588, 37 Am. Rep. 265; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282.

³ *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483, 487.

Water which one has no right to draw directly from a pond he has no right to take by percolation. This method of taking the water, as is said in a Massachusetts case, has often been found more convenient than a direct taking, but the taking has often been held to be as complete a taking as the withdrawal of it by pipes.¹

786. Subterranean water flowing in a defined channel is subject to the same rules in respect to the use or diversion of the water that govern in respect of surface streams.² The upper proprietor is entitled as against a lower proprietor to use so much of the water as he may need for domestic uses, but he must leave the surplus to flow in its natural channel. He has no right to divert the whole body of such stream through pipes, allowing the water to run to waste, or using it for other than domestic uses. There may be difficulty in ascertaining whether the water flows in a channel beneath the soil. It is presumed, until otherwise shown, that subterranean waters are formed by the ordinary percolations of water in the soil and do not constitute a stream.³ There may, however, be surface indications of a subterranean stream, as where this is indicated by a line of shrubs and bushes, in which case an upper proprietor is not allowed to appropriate or divert all the water as against a lower proprietor, any more than he could in case the stream flowed upon the surface.⁴

¹ Proprietors of Mills v. Braintree Water Supply Co., 149 Mass. 478, 21 N. E. Rep. 761; Hart v. Jamaica Pond Aqueduct, Corp. 133 Mass. 488; Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361; Brookline v. Mackintosh, 133 Mass. 215; Cowdrey v. Woburn, 136 Mass. 409; Potter v. Howe, 141 Mass. 357, 6 N. E. Rep. 233; Ætna Mills v. Brookline, 127 Mass. 69; Bailey v. Woburn, 126 Mass. 416; Ætna Mills v. Waltham, 126 Mass. 422.

² Gould on Waters, § 281; Broadbent v. Ramsbotham, 11 Ex. 602, per Park, B.; Grand Junction Canal v. Shugar, L. R. 6 Ch. 483; Dickinson v. Grand Junction Canal, 7 Ex. 282; Dudden v. Clutton Union, 1 H. & N. 627; French Hoek v. Hugo, 10 App. Cas. 336; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. Rep. 427; Hale v. McLea,

53 Cal. 578; Hanson v. McCue, 42 Cal. 303; Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 S. W. Rep. 780, 33 L. R. A. 376; Burroughs v. Saterlee, 67 Iowa, 396, 25 N. W. Rep. 808, 56 Am. Rep. 350; Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Springfield Water Works Co. v. Jenkins, 62 Mo. App. 74; Castalia Trout Club Co. v. Castalia Sporting Club, 8 Ohio C. C. 194.

³ Meyer v. Tacoma Light & Water Co., 8 Wash. 144, 35 Pac. Rep. 601; Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780; 33 L. R. A. 376; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Ocean Grove C. M. Asso. v. Asbury Park Com'rs, 40 N. J. Eq. 447, 3 Atl. Rep. 168.

⁴ Hale v. McLea, 53 Cal. 578.

If a surface stream flows into sink-hole and disappears, and afterwards emerges upon the surface, it is to be treated the same as a surface stream.¹

Rights Acquired by Grant.

787. A perpetual easement to overflow land is an interest in land which requires an instrument in writing to pass the title to it. An oral consent or license to flow land does not confer any permanent right or interest, but is revocable at any time.² A grant of a right to lay water pipes along a line definitely described by courses and distances gives no right to lay such pipes on the grantor's lands outside the location described; and such a right is not given by a conversation in which the grantor's agent said that he wanted to be paid for this privilege.³

A grant of the use of the water of a spring or stream for a factory, so long as that shall be used for a specified purpose, in a State where the word "heirs" or other words of inheritance are not requisite to create or convey an estate in fee, and every grant of real estate, or any interest therein, passes all the estate or interest of the grantor unless an intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of such grant, is not terminated by the death of either party, but continues so long as the factory is operated for the purpose named.⁴

An action may be maintained upon a covenant of warranty for damages arising from a failure of title to an easement of flowage upon the land of another contained in a deed of land with a mill site and dam site connected therewith. Such an easement appurtenant to the property sold constitutes a part of its value and fully comes within the covenant of warranty of title.⁵

A grant of a right to take water from a spring or stream creates an easement appurtenant to the grantee's land in case the purpose of the grant is declared to be to supply such land or the occupants of

¹ Whetstone v. Bowser, 29 Pa. St. 60; Saddler v. Lee, 66 Ga. 45, 42 Am. Rep. 62.

² § 80; Wilmington Water Power Co. v. Evans, 166 Ill. 548, 46 N. E. Rep. 1083; Stevens v. Stevens, 11 Met. 251; Dunham v. Joyce, 129 Mo. 5, 31 S. W. Rep. 337; Banghart v. Flummerfelt, 43 N. J. L. 28.

³ Fort Edward Water Works v. McIntyre, 4 N. Y. Supp. 638.

⁴ Whitney v. Richardson, 13 N. Y. Supp. 861.

⁵ Bowling v. Burton, 101 N. C. 176, 17 S. E. Rep. 701; Everett v. Dockery, 7 Jones, 390; Whitehead v. Garriss, 3 Jones, 171; Adams v. Conover, 87 N. Y. 422, 41 Am. Rep. 381.

it with water forever. The right is annexed to such land and runs with it though it is situated at some distance from the spring or stream.¹

788. An easement in a water privilege may be created by an implied grant, such as arises from a reservation, express or implied. The owner of a paper-mill on one side of a river and of a grist-mill and saw-mill on the other, all the mills deriving their power from a single dam, conveyed the paper-mill with all the privileges and appurtenances thereto belonging, reserving the grist-mill and saw-mill with all the privileges thereunto belonging. It was held that this was a conveyance of all the water power at that point on the stream except what was reserved, and there was reserved out of the whole water power enough to answer to the privileges belonging to the grist-mill and saw-mill, whatever those privileges might be, whether half or more than half of the water flowing at any given time in the stream. The privileges belonging to the grist-mill and saw-mill included sufficient water to operate them as they were then constructed, in low water as well as in high water.²

An easement of drainage is created by a reservation of the right to use a certain drain as heretofore used by the grantor, the grantee consenting to allow such use; and the easement passes by a subsequent conveyance by the grantor of the dominant land without express words.³

789. An easement of flowage does not arise upon a reservation implied upon the severance of an estate, unless the burden was apparent, continuous and necessary for the grantor's use. One owning a mill and a dam executed a mortgage of a portion of his land which was sometimes overflowed when the pond was full, making no reservation of a right to flow any part of the land. The mortgage was afterwards foreclosed pursuant to a judgment in which there was no reservation of any right to flow any part of the premises nor was there any such reservation in the foreclosure deed. It did not appear that at the time of the execution of the mortgage or of the foreclosure deed any portion of the mortgaged premises was overflowed, or that there was any visible sign of a previous overflow. A subsequent purchaser of the mill commenced to rebuild the dam,

¹ Cady v. Springville Water Works Co., 45 N. Y. St. Rep. 377, 31 N. E. Rep. 245; Coventon v. Seufert, 23 Oreg. 548, 32 Pac. Rep. 508.

² Miller v. Lapham, 44 Vt. 416. See Hapgood v. Brown, 102 Mass. 451.

³ Jones v. Adams, 162 Mass. 224, 38 N. E. Rep. 437.

which had been carried away by a freshet, with the intent to carry it up to its former height. It did not appear that in order to operate the mill efficiently it was necessary to maintain the dam at full height, or at such a height as would cause the overflow of the land held under the foreclosure deed. It was held that there was no implied reservation of the right to overflow this land, and that a permanent injunction was properly granted. The court said: "The doctrine of implied reservation rests upon the presumed intention of the parties as it is gathered from the conveyance, interpreted in the light of the circumstances surrounding them when it was executed and with reference to which, as existing facts, they are supposed to have contracted. If it appeared that the mill could not be operated without overflowing the plaintiff's land, it would be cogent, if not conclusive proof of that strict necessity which does not create the easement, but is simply evidence as to the intention of the parties. If, on the other hand, it appeared that owing to the slight declivity the accumulation of water was insignificant and that the mill property was worth substantially as much without the right in controversy as with it, there would be no proof of 'necessity' and nothing upon which an implication in favor of the mortgagor or grantor could rest."¹

790. Grants of easements of water and of water power depend upon the intention of the parties as expressed in the deed, taken in connection with the attendant circumstances. The grants of water power especially are various in their nature and effect, as stated by Mr. Justice Virgin in a recent decision of the Supreme Court of Maine.² "Some refer to a certain extent of water power sufficient for the propulsion of a specific mill or machinery.³ Some to a quantity of water to be restricted to a specific purpose.⁴ Others to 'such a quantity of water as the grantor or his predecessor have been accustomed to use.'⁵ Still others, to such a quantity of water as will flow through a gate of specific dimensions under a specific head of water.⁶ Head is a well-known material factor in

¹ Wells v. Garbutt, 132 N. Y. 430, 437, 30 N. E. Rep. 978, per Vann, J. See § 136.

² Deshon v. Porter, 38 Me. 289.

³ Gray v. Saco Water Power Co., 85 Me. 526, 528, 27 Atl. Rep. 455.

⁴ Avon Manuf. Co. v. Andrews, 30 Conn. 476.

⁵ Warner v. Cushman, 82 Me. 168, 19 Atl. Rep. 159; Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 219;

⁶ Bardwell v. Ames, 22 Pick. 333; Tourtellot v. Phelps, 4 Gray, 370.

determining the quantity of water which will pass through a given aperture in a given time.”¹

Under a deed of the right to use so much water out of a pond as would pass through a hole ten inches square, the grantee made an opening in the dam of one hundred square inches, the lower part of which was three feet above the dam. The grantor afterwards, at various times, for use in his own mills, drew the water in the pond down nearly to the top of the opening in the dam, but not so low that the water did not fill the entire aperture of one hundred square inches; and the grantee at such times was deprived of the usual head of water in the pond, previously enjoyed and without which his mill could not run. It was held that the deed did not call for any head of water at the dam, and that the grantor's acts in diminishing the head of water were not a wrongful interference with the grantee's rights.²

It has been held, however, that a grant of a specified amount of water from a dam implies that the grantee is entitled to such a head of water in the dam as will enable him to make a beneficial use of that amount in propelling machinery.³

But where a canal company leased to one the right to draw from their canal “so much water as would pass through an aperture of two hundred square inches, to be used solely for propelling the machinery of a paper-mill and appurtenant works, the lower edge of the aperture not to be nearer the bottom of the canal than two feet,” it was held that the quantity was to be ascertained from the character and depth of the canal, the circumstances under which the water was to be drawn, and the state of things existing at the time the grant was made.⁴

A grant of the easement of using the water in a dam to be maintained at a certain height entitles the grantee to the use of so much water as a dam of that height will supply, and it is no objection to his assertion of his right that he has increased the capacity of his mill.⁵

¹ Canal Co. v. Hill, 15 Wall. 94.

² Gray v. Saco Water Power Co., 85 Me. 526, 27 Atl. Rep. 455. See Torrance v. Conger, 46 N. Y. 340.

³ Samuels v. Blanchard, 25 Wis. 329.

⁴ Canal Company v. Hill, 15 Wall. 94, Justices Strong and Davis dissenting. This case was referred to in Gray

v. Water Power Co., 85 Me. 526, and was distinguished on the ground that the use to which the water leased was to be appropriated was specified in the lease, whereas there was no such specification in the Maine case.

⁵ Casler v. Shipman, 35 N. Y. 533.

791. A grant of a water power sufficient to operate a specific mill or specific machinery is to be construed as indicating the quantity of water and not as defining or limiting the use of it to the specific purpose named.¹ "It is a general rule of construction, applicable to grants of water powers, that when the question arises whether, by a grant of a sufficient quantity of water to propel a particular kind of machinery, the terms employed are used merely to indicate the quantity of water intended to be granted, or to restrict the use of the water to the machinery specified, the former construction is to be favored, when the language of the grant will admit of such construction. The grounds upon which this rule rests are twofold. First, it is more beneficial to the grantee, without being more onerous to the grantor, that he should be permitted to apply the water granted to any machinery he pleases, not requiring a greater amount of power than that specified in the grant. Secondly, it is supported by public policy. The interests of the community will generally be best promoted by allowing an unrestricted application of the power to such machinery as will be most profitable to the owner."²

But if the conveyance is for certain purposes, "and for those purposes only," the limitation may be held to apply to the use, and not to the quantity of the water.³

¹ Coburn v. Middlesex Co., 142 Mass. 264, 7 N. E. Rep. 849; Warner v. Cushman, 82 Me. 168, 19 Atl. Rep. 159; Carleton Mills v. Silver, 82 Me. 215, 19 Atl. Rep. 154, 8 L. R. A. 446; Albee v. Huntly, 56 Vt. 454; Hall v. Sterling Iron & R. Co., 148 N. Y. 432, 42 N. E. Rep. 1056; Mudge v. Salisbury, 110 N. Y. 413, 18 N. E. Rep. 249; Groat v. Moak, 94 N. Y. 115; Comstock v. Johnson, 46 N. Y. 615; Wakely v. Davidson, 26 N. Y. 387; Olmsted v. Loomis, 9 N. Y. 423; Cromwell v. Selden, 3 N. Y. 253; Palmer v. Angel, 69 Hun, 471, 23 N. Y. Supp. 397; Hartwell v. Mut. L. Ins. Co., 50 Hun, 497, 20 N. Y. St. 276; Terry v. Smith, 47 Hun, 333, 14 N. Y. St. 551.

² Cromwell v. Selden, 3 N. Y. 253, per Harris, J., citing Ashley v. Pease, 18 Pick. 268; Strong v. Benedict, 5

Conn. 210. See also to same effect, Carleton Mills Co. v. Silver, 82 Me. 215, 19 Atl. Rep. 154; Kaler v. Beaman, 49 Me. 207; Hines v. Robinson, 57 Me. 324, 333, 99 Am. Dec. 772; Garland v. Hodsdon, 46 Me. 511; Deshon v. Porter, 38 Me. 289; Albee v. Huntley, 56 Vt. 454; Rood v. Johnson, 26 Vt. 64; Rogers v. Bancroft, 20 Vt. 250; Shed v. Leslie, 22 Vt. 498; Dewey v. Williams, 40 N. H. 222, 228, 57 Am. Dec. 708; Johnson v. Rand, 6 N. H. 22; Sibley v. Hoar, 4 Gray, 222; Tourtellot v. Phelps, 4 Gray, 370; Pratt v. Lamson, 2 Allen, 275; Hurd v. Curtis, 7 Met. 94; Biglow v. Battle, 15 Mass. 313; Hanna v. Clarke, 31 Gratt. 36.

³ Clement v. Gould, 61 Vt. 573, 18 Atl. Rep. 453; Shed v. Leslie, 22 Vt. 498; Garland v. Hodsdon, 46 Me. 511;

In a grant of water power the words "water enough applied to an overshot wheel to carry a gang of thirty marble saws, or a six-horse power," do not restrict the manner of using water, but describe the quantity granted.¹

A grant of a privilege of drawing water from a dam in sufficient quantity for the use of a carding machine and clothing works is to be taken as a measure of quantity, and does not limit the use of them to the particular machinery specified.²

792. A riparian owner, by granting the use of the stream to another, to that extent parts with his riparian right to use or divert the water to the detriment of his grantee.³ Thus, if he grants the right to lay a one-inch pipe across his land, and to take water by the pipe from a stream thereon, he has no preferred right to the use of the water granted for household purposes, or for watering cattle upon his own land, so as to interfere with the rights of his grantee.⁴ A riparian owner who grants to another the right to lay a one-inch pipe from the stream to the grantee's land, to carry the running water of the stream perpetually, cannot afterwards lay a pipe in the stream which will so divert the water as not to leave sufficient to fill the one-inch pipe of the grantee. In such a case the grantor contended that the deed did not expressly grant the right to divert the water to the full capacity of the pipe at all times, nor to divert all the water at any time; and that, under the circumstances, it should not be so construed as to deprive the grantor of the use of sufficient water for domestic purposes; and further that the riparian owner has a preferred right to the use of so much water as is necessary for household purposes and for watering cattle. But these reasons were not regarded as of weight against the express terms of the grant of the right.⁵

793. A grant of an easement as defined by deed or by the construction of it by the acts of the parties, cannot be changed without their consent either by diminishing or enlarging the privilege

Lincoln v. Lincoln, 110 Mass. 449; DeWitt v. Harvey, 4 Gray, 486; Ashley v. Pease, 18 Pick. 268; Strong v. Benedict, 5 Conn. 210. See, however, Dow v. Edes, 58 N. H. 193.

¹ Kaler v. Beaman, 49 Me. 207; Deshon v. Porter, 38 Me. 289; Johnson v. Rand, 6 N. H. 22; Biglow v. Battle, 15 Mass. 313; Cowell v. Thayer, 5 Met. 253, 38 Am. Dec. 400, per Shaw, C. J.

² Comstock v. Johnson, 46 N. Y. 615.

³ Gould v. Stafford, 91 Cal. 155, 27 Pac. Rep. 543; Lux v. Haggin, 69 Cal. 392, 10 Pac. Rep. 674; Miller v. Lapham, 44 Vt. 416, 433.

⁴ Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107.

⁵ Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107.

granted. A grant to lay a water pipe or aqueduct made in general terms without giving any definite location, becomes fixed and definite by the grantee's laying the pipe with the acquiescence of the grantor. When the pipe is once laid its location becomes fixed and certain and cannot be changed without the consent of both parties.¹

The owner of land upon a brook entered into a written agreement with the owner of a lot fifty feet wide lower down the brook, by which the upper owner was given the right to enter such lot "for the purpose of digging out a brook and laying sewer or drain pipes through his said land for the benefit" of his own land, agreeing to hold the lower owner harmless "against any damages on account of said digging." On a bill in equity, brought by the lower owner to prevent the other from laying and maintaining drain pipes in a trench dug outside of the brook, it was held that the agreement did not authorize the defendant to lay drain pipes through the plaintiff's land in any other place than the brook.²

If a mill-owner having the right by grant to cut a canal of sufficient width to carry the water, with the right to make it of a definite width, through the land of another for a raceway from a mill to a river, cuts a canal of less width than he is entitled to by the grant, and uses the same for more than fifty years, the owner of the servient estate during all this time using the land up to the banks of the canal, his occupation of the land is not conclusive evidence of an agreement by the mill-owner to use a canal of only the width of that which was originally cut. Neither are such facts conclusive evidence of an election to build a canal of only that width, nor of an abandonment of the right to cut a canal of the full width of the grant, if needed for the use of the water-power. "Nothing in the grant limited the necessities of the mill to anything short of the whole water-power; and the right to dig a canal of the full width of one and one-fourth rods was not narrowed by digging one of less width, sufficient for the wants of the mill at the time. Within the limits of the grant the plaintiff's right of occupation was dependent upon the necessary use of the land for canal purposes, and necessity might at any time, as it eventually did, require the whole extent of the grant."³

¹ *Jennison v. Walker*, 11 Gray, 423;
Onthank v. Lake Shore & M. S. R.
Co., 71 N. Y. 194, affirming 8 Hun, 131.

² *Atkins v. Thompson*, 155 Mass. 326,
 29 N. E. Rep. 627.

³ *Wheeler v. Wilder*, 61 N. H. 2, 8,
 per Allen, J.

VII. *Rights Acquired by Prescription.*¹

794. A right to the use of the water of a stream to the prejudice of other proprietors above or below may be acquired by prescription, which affords a conclusive presumption of a grant.² Thus the right to discharge into a stream polluted water from a factory may be acquired by prescription, if the fouling of the water is not a public nuisance; but the right is limited by the character and extent of the pollution exercised during the period of prescription, and for any increase causing material injury to a lower riparian proprietor an action may be maintained.³

The right to empty a sewer into a stream which supplies water to a city cannot be acquired by prescription, for no person can acquire a prescriptive right to maintain a public nuisance.⁴

795. The right to divert water from its natural channel and convey it elsewhere is an easement which can be created by prescription, or by enjoyment for such a period that the existence of a former grant may be reasonably presumed.⁵ Such right may also be created by grant or by action of the Legislature in derogation of the common law. The legal incidents connected with the right are the same, whether the easement is created by grant or by statutory enactment, or by prescription which presupposes a grant. When

¹ See Chapter IV., §§ 158-203.

² *Bealey v. Shaw*, 6 East. 208, per *Ellenborough, C. J.*; *Wright v. Howard*, 1 Sim. & Stu. 190; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Williams v. Wadsworth*, 51 Conn. 277; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386; *Ingraham v. Hutchinson*, 2 Conn. 584; *Brace v. Yale*, 10 Allen, 441, 97 Mass. 18, 99 Mass. 488; *Rogers v. Bancroft*, 20 Vt. 250; *Burnham v. Kempton*, 44 N. H. 78; *Esling v. Williams*, 10 Pa. St. 126.

³ *Wright v. Williams*, 1 M. & W. 77; *Wood v. Waud*, 3 Ex. 748; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Mississippi Mills Co. v. Smith (Miss.)*, 11 So.

Rep. 26; *McCallum v. Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656; *Jones v. Crow*, 32 Pa. St. 398; *Holsman v. Bleaching Co.*, 14 N. J. Eq. 335; *Brookline v. Mackintosh*, 133 Mass. 215; *Prentice v. Geiger*, 74 N. Y. 341.

⁴ *Wood on Nuisance*, p. 743; *Kelly v. New York*, 27 N. Y. Supp. 164, 6 Misc. (N. Y.) 516; *Martin v. Gleason*, 139 Mass. 183, 29 N. E. Rep. 664.

⁵ *Mason v. Shrewsbury & H. R'y Co.*, L. R. 6 Q. B. 578, 10 Eng. Rul. Cas. 22, 30, per *Cockburn, C. J.*; *Wright v. Howard*, 1 Sim. & St. 190; *Beeston v. Weate*, 5 El. & Bl. 986; *Mason v. Hill*, 3 B. & Ad. 304; *Bealey v. Shaw*, 6 East, 208; *Joseph v. Ager*, 108 Cal. 517, 41 Pac. Rep. 422; *Alta Land & W. Co. v. Hancock*, 85 Cal. 219, 24 Pac. Rep. 645.

the easement is created by prescription, the right is limited by the extent of the use during the prescriptive period.¹

796. The right to interrupt the flow of a stream and detain the water by a dam may be acquired by prescription. The owner of a mill, situated upon a small stream, by erecting a reservoir dam a short distance above, and exercising control of the water of the stream, under claim of right, by means of gates built in the reservoir dam, drawing more or less than the natural flow of the stream, as he has occasion, for more than twenty years uninterruptedly, may acquire a right so to use the water, as against the intermediate owners of the land over which the stream passes; and may maintain an action to recover damages against such an intermediate owner, who substantially interferes with this right. "This mode of controlling and regulating the use of the water in the stream, as it essentially interrupted the original and natural flow of the water, and interfered materially with the right of the riparian owners of lands between the reservoir dam and the plaintiff's mill to appropriate and use the water, was in its nature adverse, and, having been continued under a claim of right for forty-five years and upwards, affords a conclusive presumption of a grant, from such intermediate owners to the plaintiff and his grantors, of such appropriation and use." ²

The prescriptive rights of such mill-owner are not forfeited as against the owners of the intermediate land over which the stream passes, by his building a new mill in place of his old one, and putting in two new wheels and other new machinery, including machinery for grinding fodder and making cider as well as for sawing wood, although the effect of such alterations is sometimes to diminish the quantity of water which he has occasion to draw down from his reservoir dam, as compared with the quantity which he had occasion to draw down previously, and by such diminution the owners of the intermediate land are prevented from working their intermediate mills in the manner in which they had been accustomed to do for more than twenty years. If the intermediate land-owners so manage their dam as to interfere with such prescriptive rights, their possessor is entitled to damages for such interference.³ He is also entitled to relief in equity against the owners of the

¹ §§ 200-202; *Bealey v. Shaw*, 6 East, per *Bigelow*, C. J. See also *Perrin v. Garfield*, 37 Vt. 304.

² *Brace v. Yale*, 10 Allen, 441, 445, ³ *Brace v. Yale*, 97 Mass. 18.

intermediate dam which delays the passage of the water from the reservoir by the time necessary to fill their pond, and by its leaky condition allows the water to so run to waste when the lower mill is not at work as to make it necessary to fill the intermediate pond from day to day.¹

797. One may acquire by prescription the right to consume the water of a stream, so that an upper riparian owner cannot subsequently interfere with this right by using the water of the stream in a way that is injurious to the owner of the prescriptive right. Even one who is not a riparian owner, but has purchased from one who is, the right to enter upon the land and divert the stream through an artificial channel to land of his own, may acquire by such diversion and use for the prescriptive period the right to have the stream come to him in its accustomed flow, and an upper riparian owner must so far respect this right that he may not subsequently commence the use of the water upon land that is not riparian.²

The exclusive enjoyment of the use of water in a particular way for twenty years or the prescriptive period is sufficient to raise a presumption of title to such use; and it is not necessary that the water should have been used precisely in the same manner, as for instance, to propel the same machinery.³

798. To acquire a right by prescription to divert water from a stream or reservoir the act of diversion must be adverse and such as to give notice of an adverse claim of right.⁴ The fact that one who owns and controls a dam and canal for the purpose of navigation diverts an inconsiderable amount of water from the stream to create a water power is not *per se* notice of an adverse claim of right to so use said water.⁵

The mere use of the water of a stream, during a season of abundance, and without objection by a riparian proprietor who is injured thereby, is not an adverse use upon which a prescription can be founded.⁶

¹ Brace v. Yale, 99 Mass. 488.

² Williams v. Wadsworth, 51 Conn. 277.

³ Belknap v. Trimble, 3 Paige, 577; Norton v. Volentine, 14 Vt. 239, 39 Am. Dec. 220.

⁴ Green Bay & M. Canal Co. v. Kaukauna Water Power Co., 90 Wis. 370, 61 N. W. Rep. 1121.

⁵ §§ 164, 165; Alta Land & W. Co.

v. Hancock, 85 Cal. 219, 226, 24 Pac. Rep. 645; American Co. v. Bradford, 27 Cal. 360; Vliet v. Sherwood, 35 Wis. 229, 38 Wis. 159; Gilford v. Winne-
piseogee Lake Co., 52 N. H. 262; Authors v. Bryant, 22 Nev. 242, 38 Pac. Rep. 439.

⁶ Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. Rep. 623.

In a suit by a landowner against the owner of adjacent land for the interruption of an easement, it appeared that for more than forty years, and as far back as his living memory went, the occupiers of plaintiff's land had been in the habit of passing over defendant's land to a brook which lay on the other side of that land, and of damming up the brook, when necessary, so as to force the water into an old artificial water-course which ran across defendant's land to plaintiff's land. They did this for the purpose of supplying their cattle with water, whenever they wanted the water, except when the owners of defendant's land used the water, as they did at certain seasons of the year for irrigation. It was held that, upon this evidence, the jury were warranted in inferring an user as of right, by the occupiers of plaintiff's land, of the easement on defendant's land.¹

An easement in a drain cannot be acquired by prescription unless the owner of the servient estate has actual knowledge of the adverse use. If the drain is not open and visible, knowledge of its existence will not be presumed.²

A servitude of drainage through a canal or ditch is continuous and apparent and may be acquired by prescription.³

799. An easement for the flow of water through an artificial water-course upon the land of another may be acquired by prescription.⁴

If it appears, however, that the enjoyment of such right of drainage through the land of another was not adverse but merely permissive, or that the drain was kept open on the servient estate for the use of the owner, no easement can be acquired by prescription.⁵

The right to use a ditch through the land of another for the purpose of drainage may be acquired by adverse use for twenty years

¹ Beeston v. Weate, 5 El. & Bl. 986.

² Treadwell v. Inslee, 120 N. Y. 458, 24 N. E. Rep. 651.

³ Levet v. Lapeyrollerie, 39 La. Ann. 210, 1 So. Rep. 672. See § 143.

⁴ Wright v. Williams, 1 M. & W. 77; Gaved v. Martyn, 19 C. B. N. S. 732; White v. Chapin, 12 Allen, 516; Prescott v. White, 21 Pick. 341, 32 Am. Dec. 266; Cary v. Daniels, 5 Met. 236, 238; Watkins v. Peck, 13 N. H. 360; Leidlein v. Meyer, 95 Mich. 586, 55 N.

W. Rep. 367; Gregory v. Bush, 64 Mich. 37, 31 N. W. Rep. 90; Kennedy v. McCollam's Succession, 34 La. Ann. 568; Wheatley v. Chrisman, 24 Pa. St. 298, 64 Am. Dec. 657.

⁵ Smith v. Miller, 11 Gray, 145; White v. Chapin, 12 Allen, 516; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Stoddard v. Filgur, 21 Ill. App. 560; White v. Sheldon, 35 Hun, 193; Dunham v. Joyce, 129 Mo. 5, 31 S. W. Rep.

or other prescriptive period. Such use is evidence of an antecedent grant.¹

And so an easement may be acquired to use an artificial canal through the land of another to divert the water of a stream to a mill.² Such easement may be appurtenant to the mill, and this will pass with the mill upon a conveyance of that.³

A right of drainage acquired by prescription does not give the right to drain an increased quantity of water and thereby cause damage to the servient estate by overflows.⁴ The beneficial use of a ditch for a length of time sufficient to raise a presumption of a grant of the right, gives no right to use another ditch differing therefrom materially either in locality or dimension.⁵

The right to use the water of an artificial aqueduct, or of a well, may be acquired by an uninterrupted use of it for twenty years.⁶ The right so acquired is of course limited to the extent and manner of such use during that period.

800. A right to set back water over another's land may be acquired by prescription, but only to the extent to which the land is habitually and usually overflowed.⁷ It is the height of the water, and not of the dam, that gains the right by prescription.⁸ It is the height of the water as ordinarily and usually kept in the dam, when in repair, that fixes the height acquired by prescription. It is not

¹ White v. Chapin, 12 Allen, 516; Prescott v. White, 21 Pick. 341, 32 Am. Dec. 266; Crittenton v. Alger, 11 Met. 281; Cary v. Daniels, 5 Met. 236.

² Nuttall v. Bracewell, L. R. 2 Ex. 1.

³ Holker v. Porritt, L. R. 10 Ex. 59.

⁴ Osten v. Jerome, 93 Mich. 196, 53 N. W. Rep. 7.

⁵ Porter v. Durham, 74 N. C. 767.

⁶ Cole v. Bradbury, 86 Me. 380, 29 Atl. Rep. 1097; Dority v. Dunning, 78 Me. 381; Tinkham v. Arnold, 3 Me. 120; Wakins v. Peck, 13 N. H. 360, 40 Am. Dec. 156; Eliason v. Grove (Md.), 36 Atl. Rep. 844; Ormsby v. Pinkerton, 159 Pa. St. 458, 33 W. N. Cas. 565, 28 Atl. Rep. 300.

⁷ Branch v. Doane, 17 Conn. 402, 18 Conn. 233; Ohio & M. R. Co. v. Elliott, 34 Ill. App. 589; Hart v. Vose, 19 Wend. 365; Townsend v. McDon-

ald, 14 Barb. 460; Williams v. Barber, 104 Mich. 31, 62 N. W. Rep. 155; Conklin v. Boyd, 46 Mich. 56, 9 N. W. Rep. 134; Gregory v. Bush, 64 Mich. 37, 31 N. W. Rep. 90; Shearer v. Middleton, 88 Mich. 621, 50 N. W. Rep. 737; Hoag v. Place, 93 Mich. 450, 53 N. W. Rep. 617; Cornwell Manuf. Co. v. Swift, 89 Mich. 519, 50 N. W. Rep. 1001.

⁸ Griffin v. Bartlett, 55 N. H. 119, 123; Town v. Faulkner, 56 N. H. 255, 261; Gilford v. Winnipiseogee Lake Co., 52 N. H. 262; Sargent v. Stark, 12 N. H. 332; Carlisle v. Cooper, 19 N. J. Eq. 256; Cooper v. Carlisle, 17 N. J. Eq. 525; Stiles v. Hooker, 7 Cow. 266; Mertz v. Dorney, 25 Pa. St. 519; Lacy v. Arnett, 33 Pa. St. 169; Sabine v. Johnson, 35 Wis. 185; Smith v. Russ, 17 Wis. 227.

necessary that the water should be kept constantly in the dam to its full capacity; not that the dam should always be kept in perfect repair. But if the dam is permitted for a considerable time, such as one or two years, to be out of repair, so as not to injure the land above it, that time will not be counted in the prescription; the prescription is interrupted and must commence anew. "This rule must apply only to such dams as are permanent, and to such gates and movable parts as are constantly used and kept in their places to raise the height of the water. Boards or gates that are only used in seasons of low water, so as to increase the water in the mill-pond without overflowing the lands above, and used at intervals only, cannot gain the right to keep the dam at the height to which they raise it, if that will make the level of the water upon the lands of the upper proprietor higher than maintained for the period of twenty years. Such boards may be used for twenty years with such care and judgment as to do no injury to the lands above, and when permanently added to the dam destroy them."¹

801. The extent of the easement of flowage acquired by prescription is measured by the extent and mode of use during the period of prescription."²

The right may in this way be limited to a particular season of the year. "As where, for example, according to the custom of the country, a saw-mill, or other mill, has been kept up in the winter only, and the mill-owner has uniformly been accustomed to draw off the water sufficiently early in the spring to allow the growth of a crop of grass, and to continue it down until the hay is cut and got in, it must be regarded as establishing a right to a winter privilege only, and not a constant privilege; and then, flowing the land through the year must be considered as a new use, and not within the mill-owner's prescriptive right."³

802. There is a difference of opinion whether an easement of flowage by a dam of a fixed and constant height is limited by the height of the dam, as ordinarily used, or by the actual height of the water during the prescriptive period; and the decisions in Massa-

¹ Carlisle v. Cooper, 19 N. J. Eq. 256, 263, per Zabriskie, Ch., citing Marclay v. Shults, 29 N. Y. 346, affirmed in Horner v. Stillwell, 35 N. J. L. 307. ton, 44 N. H. 78; Hall v. Augsburg, 46 N. Y. 622.

³ Cowell v. Thayer, 5 Met. 253, per Shaw, C. J. And see Bolivar Manuf. Co. v. Nepouset Manuf. Co., 16 Pick. 241.

² § 200; Cotton v. Pocasset Manuf. Co., 13 Met. 429; Burnham v. Kemp-

chusetts and a few other States are somewhat at variance with the text and decisions of the preceding section. "On the whole," said Chief Justice Shaw, "we think the true rule is this, that when one has acquired a prescriptive right to a constant mill privilege by keeping up and using a dam more than twenty years, which dam, in its usual operation, would raise the water to a given height, and has used it, at his own pleasure, at that height, without any claim of right on the part of any other person to have it drawn or kept down for any part of the year, or upon any definite occasion, he has a right to retain it at the same height, although from the former leaky condition of the dam, the rude construction of the machinery, or the lavish use and waste of the stream, the water has not in fact been constantly or usually kept up to that height. If, therefore, he repairs the dam, without so changing it as to raise the water higher than the old dam, when tight and in repair, would raise it, or uses it in a different mode, and thereby keeps up the water more constantly than before, it is not a new use of the stream, for which an adjacent owner can claim damages, but a use conformable to his prescriptive right."¹ This ruling was confirmed by the same court in a case in which the same eminent judge further said: "It is not the actual height of the dam which will regulate the prescriptive right of the party holding it, but its efficient height, according to its structure and operation, to maintain the height of the water when in repair and in good order; and although the water actually raised by it may to some extent vary from one season or one year to another, owing to the tightness of the dam, the mode of using the water, the different seasons, as being dry or wet, and the like, yet these considerations are too variable and uncertain to be adopted or relied on as the basis of a right acquired by grant or prescription. We think, therefore, the efficient height of the dam, in its ordinary action and operation, measures and limits the claim of the mill-owner to raise and appropriate the mill power of the stream."²

803. One may acquire by prescription the right to flow water as high as his dam will raise it when there is sufficient water, though much of the time the water in the dam is not kept at its full height by reason of the insufficiency of water. "The water may be liable to great fluctuations, and if in substance it is alleged that it was

¹ Cowell v. Thayer, 5 Met. 253, 258.

v. Shults, 39 Barb. 600, and Baker v.

² Ray v. Fletcher, 12 Cush. 200, 208.

McGuire, 53 Ga. 245.

This ruling is also followed in Hynds

kept up as high as their dam would raise it when there was water, its being drawn by the plaintiffs for their own purposes would not prevent their acquiring a right to the extent of their claim.”¹

A lower riparian owner may acquire by prescription the right to flow the land of an upper riparian owner by erecting and maintaining a dam, which, with the knowledge of the upper proprietor, floods his lands.² A railroad company, by maintaining for the prescriptive period without interruption an embankment to keep the water from its right of way, which has the effect to throw the water back upon higher and adjoining lands, acquires the right to continue to flow such lands.³

804. The owners of a dam on a stream may acquire a prescriptive right to use flash boards on their dam, to a height that does not materially interfere with a mill higher up the stream by flowing back water upon the mill wheel; and such a right as acquired by the exercise of it for more than twenty years though the practice had been for the proprietor of the lower dam to remove the flash boards when requested by the upper mill-owner to do so, one board being generally left on without objection. The right in such case is measured and limited only by such a use of the flash boards as does not materially interfere with the water wheel of the upper mill.⁴

A prescriptive right to raise the water of a mill pond during the summer months, so far as can be done without injuring the grass of meadows above the dam, is not established by the practice for more than twenty years of nailing flash boards on the dam for short periods during those months when the water did not hurt the grass, and a single instance of refusing to draw off the water upon the plaintiff's request, are all the circumstances relied upon. “The occasional use of flash boards in the summer for short periods as an exception to the general rule not to keep them up during that part of the year, does not amount to the open, uninterrupted and adverse use necessary to establish a prescriptive right.”⁵

¹ *Winnipiseogee Lake Company v. Young*, 40 N. H. 420, 436, per Bell, C. J.

² *Cooper v. Barber*, 3 Taunt. 99; *Costello v. Harris*, 162 Pa. St. 397,

³ *Louisville & N. R. Co. v. Mossman* 90 Tenn. 157, 16 S. W. Rep. 64.

⁴ *Hall v. Augsburg*, 46 N. Y. 622. And see *Marcy v. Shults*, 29 N. Y. 346; *Sumner v. Tileston*, 7 Pick. 198; *Grigsby v. Clear Lake W. Co.*, 40 Cal. 396.

⁵ *Pierce v. Travers*, 97 Mass. 306, 309, per Foster, J.

805. No easement can ordinarily be acquired for the flow of surface water over the natural face of the earth. The fact that surface water has flowed from an upper estate over a lower estate for twenty years gives the owner of the latter no prescriptive right to a continued flow of such water. The owner of the upper estate may use all the water or may construct drains which will cut off such flow.¹ The owner of the lower land may use his own land as he will, although the natural flow of the surface water may be stopped and the water set back upon the upper estate, after the natural flow has continued any length of time.²

For the same reason no right to the use of percolating or subterranean water can be acquired by prescription.³

In a few cases, however, it has been held that the right to have surface water from one estate flow over another may be acquired by prescription.⁴ Whether a lower estate owes the servitude of a natural flowage to an upper one in the first instance or not, such an easement may be acquired by prescription; and evidence that the surface water from the upper estate had run over the lower estate for more than twenty years, and the owner of the lower estate had knowledge of such flowage for the entire period, and that work had been done in clearing and improving the channel, is sufficient to establish the right by prescription.⁵

Where the owner of a parcel of land located in a city and upon a public street, the surface of which land is so depressed as to allow the surface water on a portion thereof, as well as the waters on an adjoining lot, to collect in such depression, and to flow to the public street over the other portion, sells the portion on which the waters so collect, and retains the balance, and the waters are permitted to collect and flow in the same direction, crossing the dividing line between the lot sold and the one retained at the same place, for over

¹ *Greatrex v. Hayward*, 8 Exch. 291; *Wood v. Waud*, 3 Exch. 748; *Rawstron v. Taylor*, 11 Exch. 369; *Chasemore v. Richards*, 7 H. L. Cas. 349.

² *White v. Chapin*, 12 Allen, 516; *Dickinson v. Worcester*, 7 Allen, 19; *Parks v. Newburyport*, 10 Gray, 28; *White v. Sheldon*, 28 N. Y. St. Rep. 475.

³ *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. Rep. 274; *Wheatley v. Baugh*

25 Pa. St. 528, 64 Am. Dec. 721; *Roath v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 28 Vt. 49, 55; *Frazier v. Brown*, 12 Ohio St. 294; *Delhi v. Youmans*, 50 Barb. 316.

⁴ *Ross v. Mackeney*, 46 N. J. Eq. 140, 18 Atl. Rep. 685.

⁵ *Conklin v. Boyd*, 46 Mich. 56, 9 N. W. Rep. 134; *Boyd v. Conklin*, 54 Mich. 583, 20 N. W. Rep. 595.

twenty years, the owner of the lot so retained will be prohibited by injunction from obstructing the flow of said water. The fact that during all the period of time named the complainant and his grantors had the surface of his lot over which the water flowed covered with brick, so that no channel was cut in the soil, does not lessen his rights.¹

806. One may acquire by length of user the right to have rain-water drop from the eaves of his house on to the land of his neighbor.² He does not lose this easement by rebuilding his house and carrying the wall abutting his neighbor's land to a slightly greater height than before, and consequently raising the height of the eaves from the ground to the same extent. The easement is not destroyed unless there has been a substantial variance in the mode or extent of the user or enjoyment of it, so as to throw a greater burden on the servient tenement. To have this effect there must be an additional or different servitude and the change must be a material one. To hold that any slight variation in the enjoyment of the easement destroys it, would virtually do away with all easements.³

The right to discharge water from a building, by means of spouts upon the land of another may be acquired by prescription,⁴ but in order to accomplish this the discharge of the water must have been under an assertion of right on the part of the owner of a building and not merely by the sufferance of the owner of the land upon which the waters discharged. One claiming a prescriptive right to have water from a building on his land discharged upon the land of another must show an open continuous and adverse use of such servitude for twenty years or such other prescriptive period as has been adopted in the State. If such discharge of water has been occasioned by an artificial structure upon the land of the party claiming the easement, the burden is not sustained by proof that such structure had been in the same condition for more than twenty years.⁵

¹ *Ross v. Mackeney*, 46 N. J. Eq. 162, 166, per Grove, J., citing *Hall v. 140, 18 Atl. Rep. 685*; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395.

² § 170; *Harvey v. Walters*, L. R. 8 C. P. 162; *Eaton v. Evans*, 115 Mass. 204; *Neale v. Seeley*, 47 Barb. 314.

³ *Harvey v. Walters*, L. R. 8 C. P.

⁴ *Conner v. Woodfill*, 126 Ind. 85, 25 N. E. Rep. 876.

⁵ *Hooten v. Barnard*, 137 Mass. 36.

807. One using an artificial water-course made by another for a purpose not of a permanent nature acquires no right by prescription to have it continued. Where one for his own convenience discharges surplus water upon his neighbor's land by an artificial water-course he obtains, at the expiration of the statutory period, a right to continue to discharge it, but the neighbor acquires no right to insist upon the continuance of the flow. "The reason for this is that the easement arises for the benefit of the land from which the water is discharged and continues to exist because of the continuance of the benefit of that land and for that purpose alone. It is no concern of the owner of the dominant tenement what use is made of the water by the owner of the servient tenement after it is discharged upon him; he has no right to interfere with any use to which the owner of the servient tenement may choose to put it and no means of doing so except by terminating his own easement."¹ Thus the user of a stream of water, produced by the artificial draining of a mine, for twenty years or more gives no right to the party using it as against the owners of the mine, or the persons who constructed the water-course, to have the stream continued in the same channel.²

The same doctrine is declared in the American cases.³

808. An artificial channel in place of the natural channel cannot be changed to the detriment of those who have enjoyed the new channel for the prescriptive period. If a riparian proprietor changes the natural flow of the stream, other proprietors favorably affected by the change may acquire an easement in the new water-course by prescription, so that the flow of the water cannot be changed back to its original condition.⁴ Thus if one diverts a stream into a new channel in which it continues to run, with the acquiescence of the other proprietors affected by the change, for so long a time that new rights may be presumed to have accrued, the stream

¹ Arkwright v. Gell, 5 M. & W. 203; Oliver v. Lockie, 26 Ont. 28, 34, per Street, J.; Mason v. Shrewsbury R'y Co., L. R. 6 Q. B. 578, per Cockburn, C. J.; Gaved v. Martyn, 19 C. B. N. S. 732; Greatrex v. Hayward, 8 Ex. 291; Staffordshire & W. Canal v. Birmingham Canal, L. R. 1 H. L. 254.

² Rawstron v. Taylor, 11 Exch. 369; Arkwright v. Gell, 5 M. & W. 203; Wood v. Waud, 3 Ex. 748.

³ Green v. Carotta, 72 Cal. 267, 13

Pac. Rep. 685; King v. Chicago B. & Q. R. Co., 71 Iowa, 696, 29 N. W. Rep. 406; Peter v. Caswell, 38 Ohio St. 518; Gormley v. Sandford, 52 Ill. 158; Curtiss v. Ayrault, 47 N. Y. 73.

⁴ Shepardson v. Perkins, 58 N. H. 354; Belknap v. Trimble, 3 Paige, 577, 605; Mathewson v. Hoffman, 77 Mich. 420, 434, 43 N. W. Rep. 879; Delaney v. Boston, 2 Harr. (Del.), 489; Middleton v. Gregorie, 2 Rich. L. 631; Smith v. Youmans (Wis.), 70 N. W. Rep. 1115.

cannot be returned to its former channel to the injury of such other proprietors.¹

If the artificial channel has been made to serve as a permanent channel and the flow of the water has continued for the period of prescription, owners of land through which it flows may acquire the right to use the water and the artificial channel as if it were a natural stream.²

A mill-owner constructed a dam and dug a mill-race in such manner that the waters of the stream were diverted from their ancient channel and flowed through the race. He maintained, however, at all times, a flood-gate for the purpose of returning the waters to their natural channel whenever repairs upon his mill should make it necessary. He and his grantees continued to flow the water through the race for a period of more than twenty-one years, during which time the water was occasionally and temporarily restored to the ancient channel. This channel had, by long disuse, become obstructed and partially filled, so that it was not sufficient to carry off all the water which originally passed through it. For the purpose of repairing the mill, its owners opened the gate and restored the water to the ancient channel which flooded the land of the plaintiff who had purchased from the mill-owner, and injured her crops. It was held, that nothing in the condition of things, or in the acts of the parties, at the time of the plaintiff's purchase, showed that the use of the ancient channel had been permanently abandoned; and the mill-owners still retained the right to restore the water to its old channel whenever the repairs of their mill rendered such course necessary and advisable.³

809. Whether an easement can be exchanged by parol for another easement of the same kind, and the time of enjoyment of

¹ Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344; Norton v. Volentine, 14 Vt. 239, 246, 39 Am. Dec. 220; Ford v. Whitlock, 27 Vt. 265.

² Holker v. Porritt, L. R. 8 Ex. 107, L. R. 10 Ex. 59; Gaved v. Martyn, 19 C. B. N. S. 732; Beeston v. Weate, 5 El. & B. 986; Ivimey v. Stocker, L. R. 1 Ch. 396; Nuttall v. Bracewell, 4 H. & C. 714; Adams v. Manning, 48 Conn. 477; Delaney v. Boston, 2 Harr. (Del.), 489; Murchie v. Gates, 78 Me. 300, 4 Atl. Rep. 638; Shepardson v. Perkins,

58 N. H. 354; Belknap v. Trimble, 3 Paige, 577; Townsend v. McDonald, 14 Barb. 460; Prescott v. White, 21 Pick. 341, 32 Am. Dec. 266; Fleming's App., 65 Pa. St. 445; Reading v. Althouse, 93 Pa. St. 400; Freeman v. Weeks, 45 Mich. 335, 7 N. W. Rep. 904; Bowne v. Deacon, 32 N. J. Eq. 459; Weatherby v. Meiklejohn, 56 Wis. 73, 13 N. W. Rep. 697; Ford v. Whitlock, 27 Vt. 265; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344.

³ Peter v. Caswell, 38 Ohio St. 518.

one can be added to the other to make out the time necessary for requiring title by prescription, is a question upon which there is some diversity of opinion, though it is largely a question of fact whether the one easement is substantially the same as the other. Thus, where the owner of land used a ditch for the drainage of water from his land over that of another for sixteen years when a new ditch was made near the former, the old one being filled up, and he had the use of the new ditch for five years, it was held that he did not thereby acquire a prescriptive right to use the new ditch, as the time of the use of the new ditch could not be added to the time of the use of the old one to make a prescriptive period of twenty years.¹

810. The same principle has been applied to changes in the level of a lake or pond, when, by means of a dam, the level has been raised by a mill-owner for the purposes of his mill, and continued for many years at this higher level. Thus, where the natural outlet of a lake was closed, and an artificial outlet made, near which a dam for milling purposes was constructed and maintained for forty years, whereby the water was caused to flow back over the lands of other riparian owners, rendering their lands valuable as pleasure resorts, the dam owner, so long as he retains his easement, has no right to lower the water below the level of the lowest point at which it has been during said period, so as to leave the shores marshy and unhealthful, and impair the value of the riparian property.²

No doubt the proprietor who has diverted a stream into a new channel or raised the level of a lake and by continuance of the change has acquired an easement to maintain the changed condition, may abandon the use of his easement, as he is not bound by any law or agreement to continue its exercise.³ But if there has been no abandonment or surrender, he is required to keep the flow of water or the level of the lake in the condition in which he has maintained it for the prescriptive period.⁴

¹ *Total v. Bonnefoy*, 123 Ill. 653, 14 N. E. Rep. 687.

³ *Mason v. Shrewsbury & H. R. Co.*, L. R. 6 Q. B. 578.

² *Smith v. Youmans* (Wis.), 70 N. W. Rep. 1115. And see *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297, 48 N. W. Rep. 371.

⁴ *Smith v. Youmans* (Wis.) 70 N. W. Rep. 1115

PART III.
REPAIRS, EXTINCTION AND REMEDIES.

CHAPTER.

XVII. REPAIRS AND ALTERATIONS.

XVIII. EXTINCTION.

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PART III.

REPAIRS, EXTINCTION AND REMEDIES.

CHAPTER XVII.

REPAIRS AND ALTERATIONS.

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I. Repairs and Renewals in General.

811. Every easement includes "secondary easements," such as the right to enter upon the servient tenement and make repairs, and to do such things as are necessary for the full exercise of the right; but such secondary easements can be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement. The owner of the dominant tenement can make no alteration in his mode of enjoying the easement which will increase its burden. He has no right to commit a trespass upon the servient tenement, as he does when he enters upon that tenement and extends a ditch, which he has acquired the right to maintain, either by grant or prescription, beyond the limits fixed by the grant or by use.¹

The right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a "secondary easement,"² a mere incident of the easement that passes by express or implied grant, or is acquired by prescription.

¹ Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422, per McFarland, J.; ² Nicholas v. Chamberlain, Cro. Jac. 121; Toothe v. Bryce, 50 N. J. Eq. 589, 609, 25 Atl. Rep. 182.

812. The grant of an easement carries with it by implication whatever incidental right is necessary to its beneficial enjoyment, provided the grantor has power to bestow it. The grant of a way implies the right to make or mend the way. The grant of a turbary implies a right not only to cut the turfs but also to stack them for removal.¹ “The law,” says Lord Coke, “gives to him who ought to repair a bridge to enter into the land, and to him who has a conduit in the land of another, to enter into the land to mend it when occasion requires it.”²

The grant of the use of a building so long as it shall stand includes the right to repair it. Repairing a building is not a rebuilding of it. Thus, where a religious society had the right to have a “horse-shed stand where it now does, during the life thereof,” it was held that the term “life” referred to the continuance or existence of the shed as such, and that so long as it could be reasonably used for the purpose for which it was erected, it might continue to stand; and that the owners of the shed might make reasonable repairs upon it from time to time as they were needed.³

813. Secondary or ancillary easements are not excluded by a clause in a deed that no easement shall pass by implication. Thus where a deed was made of a mill-site, with the right as appurtenant thereto, of constructing a canal through the grantor’s land, and of drawing water from a pond for the use of a mill on the granted land, with a provision that “no rights, privileges, easements, nor appurtenances not so hereinafter set forth, shall pass by this indenture by any intendment or implication,” it was held that this restrictive clause did not prevent the grantee from maintaining and repairing the dam which held the water of this pond. Mr. Justice Mitchell, delivering the judgment of the Supreme Court of Minnesota, to this effect, said: “As the right to maintain this dam is necessary to hold the water in this pond, and hence necessary to the enjoyment by the grantees of the right to draw water from it, it is conceded that the situation of the subject-matter of the deed was such as would, in the absence of any restrictive clause, imply a grant to maintain the dam. But it is contended that, as no such grant is expressed in the deed, it could not pass by implication or intendment, because these are expressly cut off; and that it cannot

¹ *Wetmore v. Fiske*, 15 R. I. 354, 5 Atl. Rep. 375, per Durfee, C. J.

² *Liford’s Case*, 11 Rep. 52a. And see *Goodhart v. Hyett*, 25 Ch. D. 182.

³ *Benham v. Minor*, 38 Conn. 252.

be assumed as an appurtenance to the thing granted, because it is not specifically enumerated. According to this construction of the deed, not only had the grantees no right to repair or maintain the dam, but the grantors might have removed it the next day and thus deprived the grantees of all water-power, and rendered their property useless. Under such a view it would be difficult to imagine a more barren and worthless grant than that of the right to construct a canal and to draw water from the pond; for, without the dam, there would be no pond, and consequently no water to draw. A construction of the deed that would render the grant so comparatively nugatory should not be adopted unless the language is such as to admit of no other reasonable construction. So far from this being the case, the deed bristles all over with provisions indicating that the parties intended, and had in contemplation, the continued maintenance of the pond, which necessarily included the maintenance of the dam also."¹

814. The owner of a dominant estate, having an easement, has the right to enter upon the servient estate and make repairs necessary for the reasonable and convenient use of the easement, doing no unnecessary injury to the servient estate.²

An easement to maintain a dam necessarily involves the right to repair it, and this involves also the right to go upon the land for that purpose. The easement includes not merely the right to maintain and repair the breastwork of the dam, but also the banks at the sides of it, and to go upon the land of the servient tenement for that purpose.³

¹ *St. Anthony Falls Water Power Co. v. Minneapolis*, 41 Minn. 270, 274, 43 N. W. Rep. 56.

² *Gerrard v. Cooke*, 2 Bos. & P. N. R. 109; *Duncan v. Louch*, 6 Q. B. 904; *Ewart v. Cochrane*, 1 Paterson (Sc. App.), 1010, 4 Macq. 117, 10 Eng. Rul. Cas. 60; *Colebeck v. Girdlers' Co.*, 1 Q. B. Div. 234; *Prescott v. Williams*, 5 Met. 429, 39 Am. Dec. 688; *Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 266; *Jones v. Percival*, 5 Pick. 485; *Doane v. Badger*, 12 Mass. 65; *Thayer v. Payne*, 2 Cush. 327; *Herman v. Roberts*, 119 N. Y. 37, 42, 23 N. E. Rep. 442; *McMillan v. Cronin*, 75 N.

Y. 474; *Wells v. Tolman*, 34 N. Y. Supp. 840; *Huntington v. Asher*, 96 N. Y. 604, 613; *Roberts v. Roberts*, 7 Lans. 55; *Beals v. Stewart*, 6 Lans. 408; *Williams v. Safford*, 7 Barb. 309; *Durfee v. Garvey*, 78 Cal. 546, 21 Pac. Rep. 302; *Ware v. Walker*, 70 Cal. 591, 12 Pac. Rep. 475; *Pico v. Colimas*, 32 Cal. 578; *Kaler v. Beaman*, 49 Me. 207; *Gillis v. Nelson*, 16 La. Ann. 275; *Hair v. Downing*, 96 N. C. 172, 2 S. E. Rep. 520; *Frailey v. Waters*, 7 Pa. St. 221; *Thompson v. Uglow*, 4 Oreg. 369.

³ *Edgett v. Douglass*, 144 Pa. St. 95, 22 Atl. Rep. 868.

It also includes the right to restore a dam that has been carried away by a freshet.¹

The purchase of a mill and a mill-pond, with an easement for discharging the water from the pond, through a race-way over adjoining lands, is not restricted to the race-way, in the condition in which it was at the time of his purchase, but he has the right to make the necessary improvements, to obtain the full enjoyment of the easement. He may remove deposits in the race-way to the sides of it and lower its bed to its original depth, though this is below the depth at the time of the purchase. The sinking of the race-way to its original depth is in the nature of a repair and is authorized as such.²

815. The grantee of a right of way acquires the right to enter upon the land and construct such a roadbed as he desires, suitable to the use to be made of it. He can break up the soil, level irregularities, fill up depressions, blast rocks and remove impediments.³ If his easement is that of a carriage-way, he has the right to construct a road adapted to such use.⁴ If the way granted is for carrying coal, he may construct such a road as is commonly used at the time and place of the grant for that purpose,⁵ and if after the date of the grant a railroad comes in to use for that purpose, the grant is held to cover the construction of such a road.⁶ But one having a right of way for a wagon or cart-road for ordinary purposes, and not for working a mine, cannot construct a railroad.⁷

One having a right of way to his house has the right to build a suitable road as well as to repair it. "If you grant to me over a field a right of carriage-way to my house, I may enter upon your field and make over it a carriage-way sufficient to support the ordinary traffic of a carriage-way, otherwise the grant is of no use to me, because my carriage would sink up to the naves of the wheels in a week or two of wet weather. It cannot be contended that the word 'repair' in such a case is limited to making good the defects in the original soil, by subsidence or washing away; it must

¹ Riverdale Park Co. v. Westcott, 74 Md. 311, 28 Am. St. Rep. 249.

² Beals v. Stewart, 6 Lans. 408.

³ Herman v. Roberts, 119 N. Y. 37, 23

N. E. Rep. 442; Atkins v. Bordman, 2 Met. 457, per Shaw, C. J.

⁴ Newcomen v. Coulson, 5 Ch. D. 133.

⁵ Senhouse v. Christian, 1 T. R. 560, 1 Durn & E. 560.

⁶ Dand v. Kingscote, 6 M. & W. 174.

⁷ Leake, Land Laws, pt. III, p. 210; Bidder v. North Staffordshire R'y, 4 Q. B. Div. 412.

include the right of making the road such that it can be used for the purpose for which it is granted.”¹

The grant of an easement to dig a canal includes the right to throw out the soil beyond the limits fixed for the canal. Whether it is reasonable to leave the earth thrown from the canal upon its banks, is a question of fact depending upon the purpose for which the easement was granted, the extent of the grant, the uses to which the land was devoted at the time of the grant, the usage in constructing similar canals and all the circumstances of the case.²

816. The grantee of a defined way has the right to do whatever is necessary to make it fit for the use intended.³ He may bridge or fill an impassable ditch; and whether he shall bridge it or fill it may depend upon the relative convenience or inconvenience to the parties of the one or the other method.⁴ But of course he has no right to obstruct the flow of a stream which is a natural water-course.⁵

Where one purchased a hotel with a passage-way extending continuously around it over land of the grantor, on foot and with vehicles, and the passway, existing at the time of the conveyance, did not admit of a continuous passage around the building, due to the fact that two of the ways at their intersection were on different levels, it was held that the grantee was entitled to fill the ways to the same level, so as to admit of a continuous passage with vehicles, though by so doing access on the part of the grantor, by means of the passway filled, to a portion of a stable, owned by him, in the rear of the hotel, was shut off, and two windows of the stable obstructed, and also a door in the rear of the hotel. “The natural meaning of the language of the deed is inconsistent with the existence of an impassable gulf across the way. It would deceive a grantee ignorant of the lay of the land, and defraud him, if the gulf could not be bridged or otherwise made passable. The parties knew the situation. If their intention was that the obstruction should be permanent and irremovable, they naturally would, as they easily might, have expressed such intention. It cannot reasonably be

¹ *Newcomen v. Coulson*, 5 Ch. D. 133, 143, per Jessel, M. R.

² *Wheeler v. Wilder*, 61 N. H. 2.

³ *Senhouse v. Christian*, 1 T. R. 560, 570; *Osborn v. Wise*, 7 Carr. & P. 761; *Leonard v. Leonard*, 7 Allen, 277, 283.

⁴ *White v. Eagle & P. Hotel Co. (N. H.)*, 34 Atl. Rep. 672; *Bean v. Coleman*, 44 N. H. 539; *Garland v. Furber*, 47 N. H. 301.

⁵ *Haynes v. Burlington*, 38 Vt. 350, 360.

supposed that they would select words apt to describe a continuous and uninterrupted way of passage around the hotel, without mention of or allusion to the then-existing impassable barrier, if they understood such passage was to be forever impossible.”¹

517. One having a right of way may repair or improve it for the purpose of making it fit and convenient for use. He may work upon its surface and pave it and make it as beneficial to himself as possible, provided he does not make any material charge in the state and condition of the soil, or disturb or interfere with the estate or privileges of other persons therein. For such acts he cannot be treated as a trespasser by the owner of the land who holds it subject to such easement.² The owner of the right of way may dig up and level the soil. He may remove parts of it to level or grade the way. He may use the soil of one part of the way for grading another part. All this is consistent with the rights of the owner of the soil. But the ownership of the soil dug up and removed wholly from the way is in the landowner and not in owner of the right of way. If there are trees in the line of the way and it is necessary to cut them down and remove them, the property in the trees so cut remains in the landowner.³

518. The fact that one having a right of way which had been used for a period of sixty years, had never made repairs upon it, does not prove that he had no right to make repairs. “It is no doubt true that the extent of a right of way, established by user, must be controlled by the user; but the proof must clearly establish such user, for the purpose of depriving a party of the exercise of such the right, in the usual and accustomed mode necessary for its enjoyment. The proof in this case falls far short of establishing that the right of way of the plaintiff consisted only of the privilege of passing across the defendant’s land, without any privilege to repair or to keep the same in a condition suitable for the purpose for which it was designed. * * * The very existence of a right of way precludes the idea that the party who has the right cannot repair or keep the way in order. Suppose the way should be partially impaired by a storm, or in some other manner become obstructed

¹ White v. Eagle & P. Hotel Co. (N. Badger, 12 Mass. 65; Roberts v. Rob-
H.), 34 Atl. Rep. 672, per Carpenter, J. erts, 55 N. Y. 275; Thompson v.

² Brown v. Stone, 10 Gray, 61, 69 Uglow, 4 Oreg. 369.

Am. Dec. 303; Atkins v. Bordman, 2 ³ Lyman v. Arnold, 5 Mason, 195,
Met. 457, 37 Am. Dec. 100; Doane v. 198, per Story, J.

and impassable. Can it be claimed that there is no power to repair it and put it in order? Clearly not; for the right to repair is incident to the easement, and without it the way might become useless and of no benefit.”¹

On the other hand, the fact that one claiming a right of way by prescription has kept it in repair for his own use and that of the owner of the land does not estop the latter from denying the right to such easement. The right of way may have been used by permission or parol license of the landowner, without any adverse use of it whatever, and the claimant may have kept it in repair for his own benefit and as a fair compensation on his part for the use of the way.²

819. One who has acquired by prescription a right of way over another's land, has no right to cut ditches for the improvement of the way by draining the water from it, without the consent of the owner of the soil. The owner of the right of way doubtless might acquire such a right as incident to his right of way by a prescriptive use of it; just as he might acquire a right to repair the way by taking earth from the adjoining lands, or even timber, as an incident to his right of way.³ But in a New York case, which may be distinguished from that just cited, where one having a right of way by prescription, while engaged in making repairs, so as to turn the water, by means of a ditch filled with stones, from the middle of the road, was assaulted by the owner of the soil, it was held that the latter was liable in damages for the assault. The owner of the easement was rightfully in possession, and the owner of the soil was not, and could only claim that he had a right to the possession, on the ground that the owner of the easement had forfeited his right by unwarranted acts. This was not enough to justify the use of force in taking possession.⁴

820. In repairing a ditch or water-race the owner of the easement has the incidental right to use the adjacent soil for this purpose, in case the repairs cannot be made in any other way. The fact that the earth so used is the property of the owner of the servient tenement does not settle the question whether the owner of the easement may take it for the purpose of making repairs. “The owner of

¹ *McMillan v. Cronin*, 75 N. Y. 474, 477, per Miller, J.

³ *Capers v. M'Kee*, 1 Strobh. 164.

² *Long v. Mayberry*, 96 Tenn. 378, 36 S. W. Rep. 1040.

⁴ *McMillan v. Cronin*, 75 N. Y. 474, 57 How. Pr. 53.

the easement is privileged to repair in all cases were the easement cannot be enjoyed without repairs; and in making them, he may dig up the soil and otherwise use and encumber it, doing no more injury than is necessary, when such course is indispensable to the enjoyment of the easement.”¹

A reservation of the right to take gravel from the granted land for the purpose of repairing a mill-dam, general in terms, and fixing no place from which the gravel should be taken, is nevertheless defined by the fact that, for ten years or more, gravel had been taken from a certain pit, and that it was an established pit, and that this was the nearest and most convenient place from which the owner of the dam could take gravel.²

The fact that one having an easement to maintain a drain over adjoining land cannot fix the line of the drain on such land, does not deprive him of the right to go on the land to repair the same, as, by digging on his own land, he can determine where the drain enters the adjoining land, and from there can follow it, without undue disturbance of the land.³

821. The owner of an easement is under no obligation to make repairs except as he may desire to do so for his own advantage.⁴ A grant of a right of way implies no condition or covenant that the grantee shall keep it in repair. As between the owner of the easement and the owner of the servient estate the right and duty of repairing belong wholly to the former, in the absence of any agreement by the latter.⁵

The owner of the dominant tenement may be liable for injuries occasioned by his neglect to repair, and in this way he may be considered as bound to make the necessary repairs of the subject of the easement.⁶

822. A servitude does not impose upon the owner of the servient estate any personal obligation to perform any act or service in respect of such estate for the benefit of the owner of the dominant

¹ Thompson v. Uglow, 4 Oreg. 369, 373, per Upton, C. J.

² Corliss v. Dunning, 8 Wash. 332, 35 Pac. Rep. 1074.

³ Jones v. Adams, 162 Mass. 224, 38 N. E. Rep. 437.

⁴ Pomfret v. Ricroft, 1 Wms. Saund. 321; Duncan v. Louch, 6 Q. B. 904; Roberts v. Roberts, 55 N. Y. 275.

⁵ Taylor v. Whitehead, Doug. 744; McMillan v. Cronin, 75 N. Y. 474, 57 How. Pr. 53; Walker v. Pierce, 38 Vt. 94; Jones v. Percival, 5 Pick. 485, 487.

⁶ Roberts v. Roberts, 55 N. Y. 275; Kaler v. Beaman, 49 Me. 207; Doane v. Badger, 12 Mass. 65

estate, such, for instance, as to maintain a gate.¹ His whole burden consists in being restrained from doing something or in suffering something to be done upon his property by another, who has the easement.²

If one has acquired by prescription a right of support to a house from an adjoining building, the servient owner is not bound to repair the building which gives such support, but the owner of the dominant tenement may repair it, and for that purpose he may enter on the servient tenement, in order to preserve his easement.³

Where a servitude of support to a highway by an adjoining wall has been acquired, the owner of the highway, and not the owner of the wall, is bound to repair the wall when out of repair and insufficient to support the highway. "As a general rule, easements impose no personal obligation upon the owner of the servient tenement to do anything; the burden of repair falls upon the owner of the dominant tenement. There is abundance of authority for this, and it is in accordance with the principle of the civil law which imposed the burden of repair in cases of easements upon the owner of the dominant, and not upon the owner of the servient tenement."⁴

Where one conveys to another the right to dig a ditch across a portion of his farm, and to maintain it, for the purpose of perpetually conveying and receiving a supply of water from a spring thereon, there is no obligation on the part of the grantor, or those claiming under him, to keep the ditch in repair, or prevent its becoming filled up by the trampling in it of cattle pastured on the land through which it runs. The grantor has the right to use his land through which the ditch is constructed for ordinary farm purposes, such as raising grain or for pasturage, or for grass land; and the

¹ *Rowe v. Nally*, 81 Md. 367, 32 Atl. Rep. 198; *Brill v. Brill*, 108 N. Y. 511, 15 N. E. Rep. 538; *McMillan v. Cronin*, 75 N. Y. 474; *Williams v. Safford*, 7 Barb. 309; *Huntington v. Asher*, 96 N. Y. 604; *Ware v. Walker*, 70 Cal. 591, 12 Pac. Rep. 475; *Bartlett v. Peaslee*, 20 N. H. 547, 51 Am. Dec. 242; *Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 266; *Ballard v. Butler*, 30 Me. 94; *Walker v. Pierce*, 38 Vt. 94; *Puryear v. Clements*, 53 Ga. 232.

² *Pomfret v. Ricroft*, 1 Wms. Saund.

321, 323, 1 Ventr. 26, 44, 10 Eng. Rul. Cas. 16, *Taylor v. Whitehead*, Doug. 744; *Smith v. Archibald*, 5 App. Cas. 489, 512, per Lord Blackburn.

³ *Colebeck v. Girdlers' Co.*, 1 Q. B. D. 234, 243.

⁴ *Stockport Highway Board v. Grant*, 51 L. J. Q. B. 357, 359, per Lopes, J., who also remarked during the argument, "I never heard of a servitude which had an obligation to repair." See also *Hamilton v. St. George's Vestry*, L. R. 9 Q. B. 42.

owner of the easement has no right to complain that the grantor's cattle and horses trampled in the ditch and filled it up.¹

An easement to take water from a well imposes no obligation on the owner of the servient estate to keep the well in repair.²

823. But it has been held that a servitude may be acquired by prescription, charging one's property with the payment of a portion of the cost of repairing a dam. "A covenant to make the payments," says Mr. Justice Allen, "would run with the land. A duty imposed on the grantee and his assigns by stipulation in the deed would be enforced in equity against the land. We see no reason why the same duty may not be established by prescription. In *Doane v. Badger*³ it was recognized, though not expressly decided, that where the owner of a close had an ancient right to take water from a well and pump situated on another close, he might be bound by prescription to keep the well and pump in repair."⁴ A minority of the court dissented from this conclusion, Chief Justice Field saying: "The effect of this decision seems to me to be, that when any one buys a mill privilege on a stream which at the time of the purchase is unused, because the dam on the privilege has been carried away, if the stream has on it a reservoir dam belonging to other persons some distance above the mill privilege, and if as a fact his predecessors in title have maintained the dam on the mill privilege and used the mill, and have also contributed to the maintenance of the reservoir for more than twenty years continuously, an easement or servitude is acquired by prescription in the land which constitutes the mill privilege, for the benefit of the owners of the reservoir, or as appurtenant to the reservoir, to have this contribution continued payable out of the land, even although the purchaser at the time of the conveyance of the mill privilege to him knew

¹ *Joslin v. Sones*, 80 Iowa, 534, 45 N. E. Rep. 917.

² *Ballard v. Butler*, 30 Me. 74; *Doane v. Badger*, 12 Mass. 65; *Brondage v. Warner*, 2 Hill (N. Y.), 145.

³ 12 Mass. 65.

⁴ *Whittenton Manuf. Co. v. Staples*, 164 Mass. 319, 330. The learned judge further said "It is well established that there may be a prescriptive duty to maintain fences. *Bronson v. Coffin*, 108 Mass. 175, and cases cited. Also ways. *Middlefield v. Church Mills*

Knitting Co., 160 Mass. 267. See also *Lynn v. Turner*, Cowper, 86; *Kingston-upon-Hull v. Horner*, Loft, 576; where it was held that there may be a prescriptive duty of keeping the bed or banks of a stream in order. So, where a reservoir dam is maintained for the benefit of several estates, the duty of repairs in whole or in a specified proportion may be established by prescription as a charge against one of the estates in interest."

nothing of any such contribution, and the registry of deeds contained no information on the subject. With perhaps one or two exceptions, easements in land are passive in their character, and when acquired by prescription consist in the right to use the servient tenement in a certain manner defined by an adverse user continued for the requisite period of time, and they are acquired by notorious acts done on the land under a claim of right. Payments of varying sums of money, from year to year, by an owner of a mill privilege to the owners of a reservoir situated on the stream some distance above the privilege are not in their nature notorious acts done on the mill privilege.”¹

824. The owner of the servient land through which another has a right of drainage has no right to so use it as to prevent or interfere with repairs of the drain. Thus, where such owner erected a barn over a covered drain and used it for the storage of hay, the structure resting on wooden posts and the flooring consisting of loose boards, it appearing that the barn materially interfered with the making of repairs of the drain and rendered such repairs more expensive than they would have been had the barn not been erected, it was ordered that the owner should demolish the portion of the barn covering the drain and should pay damages for the obstruction. The duty cannot be imposed on the owner of the easement of taking up the floor of the barn and removing all obstructions before being in a position to examine or open up the drain for repairs.²

The owner of land through which another has acquired an easement by prescription to maintain pipes for a water supply, may be restrained from building on such land, over the line of pipes, for the owner of the easement has the right to go upon the land and repair the pipes when necessary, and the building of a house over the line of the pipes would interfere with his means of access to them and would render repairs more expensive. “It appears to me,” said North, J., “that this is a case in which I am bound to interfere by granting an injunction, because there is not only a mere possibility that harm may come, but the necessary effect of what is being now done is that when the pipes have to be repaired there will be a greater difficulty and greater expense in doing it than at the present time.”³

¹ Whittenton Manuf. Co. v. Staples,
164 Mass. 319, 333

² Wheeler v. Black, 14 Canada S. C.
242.

³ Goodhart v. Hyett, 25 Ch. D. 182, 190.

825. Reasonable notice of an intention to make repairs should be given, where only an occasional use of a right of way or other easement is granted for the purpose of repairs. If a person has a privilege of taking stones and gravel from land of another, where it is most convenient and least prejudicial, to build and repair a dam and canal, and a privilege of passing and repassing from a road through the land with teams, by gates or bars, where most convenient and least prejudicial, the owner of the land subject to the easement is entitled to reasonable notice of the intention of the owner of the easement to make repairs, before being liable to an action for obstructing the right of way. "The grant to the plaintiff does not give him the right to pass at all times. He has only a right to pass when it is necessary to repair his dam. Intervals of uncertain length must occur in which there would be no occasion to use the way. The defendant has the right to make any use of her land which is not inconsistent with this occasional right of way. * * * Otherwise, the right to an occasional use would be converted into a right of a permanent and constant use."¹

And so one having a right to pass and repass over the land of another "for the purpose of repairing his building at all times when necessary," should give to the landowner reasonable notice that he is about to make repairs and will have occasion to use the way, for the landowner is not bound to keep the way free from obstructions at all times so that it could be used without notice. Without such notice the landowner is not liable for obstructing the way.²

II. *Alterations by the Owner of the Dominant Estate.*

826. The owner of the dominant estate is not allowed to make material alterations in the character of his easement, although such alterations would not make the easement more burdensome to the servient estate, or might by some persons be regarded as a benefit to that estate, if the owner of that estate objects to the change.³

¹ Mansfield v. Shepard, 134 Mass. 520, 521, per Morton, C. J.

² Phipps v. Johnson, 99 Mass. 26.

³ Allen v. San Jose Land & W. Co., 92 Cal. 138, 28 Pac. Rep. 215, 15 L. R. A. 93; Luttrell's Case, 4 Co. Rep. 84*b*, 10 Eng. Rul. Cas. 295; Wimbledon & P. Commons v. Dixon, 1 Ch. D. 362, 10 Eng. Rul. Cas. 164; Curriers' Co. v.

Corbett, 2 Drew & S. 355; Heath v. Bucknall, L. R. 8 Eq. 1, 5; Tapling v. Jones, 11 H. L. C. 290; Johnson v. Jaqui, 27 N. J. Eq. 552; Dewey v. Bel-lows, 9 N. H. 282; Jennison v. Walker, 11 Gray, 423; Cary v. Daniels, 8 Met. 466, 41 Am. Dec. 532; Onthank v. Lake Shore & M. C. R. Co., 71 N. Y. 194, 27 Am. Rep. 35; Evangelical Luth. St.

Thus, where the owner of an easement to run water in an open ditch over another's land, undertakes to lay pipes in the ditch of no greater carrying capacity than the ditch, the proposed alteration is such as tends to substitute a new and different servitude, and will be enjoined. An allegation by the owner of the easement "that the alteration in the mode and manner of using the easement will be less burdensome to the servient estate, and more convenient to the defendant," will not be considered in a case where it is insisted that the alteration is so substantial that it would result in the creation and substitution of a different servitude from that which previously existed.

827. The owner of an easement cannot materially increase the burden of it upon the servient estate; but he may make repairs and improvements that do not, in substance, affect its character.¹ Thus, one who has an easement to convey water over the lands of another by a ditch for the purpose of irrigation, may remove inequalities in the ditch to bring it to a uniform grade, provided this change does not increase the amount of water to be conveyed through the ditch, nor damage the servient lands. If the depth of the ditch depends upon a prescriptive right, the true depth at which it may be maintained is determined by the grade and general depth, and not by unimportant irregularities in the bottom of it.²

A reservation of the use "of a supply of spring water by means of a hydraulic ram, wheel, or other process of forcing water," so that a supply of water may at all times be had, authorizes the grantor to erect a wind-mill for the purpose of forcing the water from the spring, although the means employed before such conveyance, had been at one time a hydraulic ram and at another a wheel. "The language used," say the court, "indicates no intention to deny the use of such improved process as science may discover or mechanical ingenuity invent for forcing water. It may not be an injurious or offensive process not contemplated in the reservation. The wind-mill is not averred to be either the one or the other; nor that it works any substantial injury to the plaintiff, either by occupying a larger quantity of land, or by taking an increased volume of water.

J. & O. Home v. Buffalo Hydraulic Asso., 64 N. Y. 561; Elliott v. Rhett, 5 Rich. 405, 57 Am. Dec. 750; Darling-ton v. Painter, 7 Pa. St. 473.

¹ Roberts v. Roberts, 7 Lans. 55, 55 N. Y. 275.

² Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. Rep. 922.

The question is simply, whether a wind-mill is itself outside of the 'other process' reserved? We think it is not."¹

One who has acquired a right by prescription to take water from a spring may lay down a new and different conduit provided he takes no more water through it than he did through the original conduit.²

828. A substantial change in the manner of enjoyment of an easement may be restrained by injunction, if the change would in effect result in the creation and substitution of a different servitude from that which had been acquired;³ and it is immaterial whether the change will benefit the servient estate or not. It is for the owner of that estate to determine whether the change will be beneficial to his estate, and it is for him to say whether he will allow such a change. No one can compel him to have his property improved in a particular manner.⁴

A grant in general terms of a right to lay a pipe for the purpose of conducting water across the land of the grantor without specifying the place for laying it or the size of the pipe, is defined and made certain by the act of the grantee in laying down the pipe; and after he has once laid the pipe with the acquiescence of the grantor, the grant which was before general and indefinite becomes fixed and certain and the grantee cannot change the easement either by relaying the pipe in another place or by increasing its size.⁵

829. Where there are several owners in common of a private way, each may make reasonable repairs which do not injuriously affect his co-owners; but he cannot make any alteration of the course of the way or any change in its grade or surface which will make the way less convenient and useful to any appreciable extent to any-

¹ Richardson v. Clements, 89 Pa. St. 503, 506, 33 Am. Rep. 784.

² Blaine v. Ray, 61 Vt. 566, 18 Atl. Rep. 189.

³ Jaqui v. Johnson, 27 N. J. Eq. 526; Cary v. Daniels, 8 Met. 466, 41 Am. Dec. 532; Roberts v. Roberts, 55 N. Y. 275.

⁴ Dickenson v. Grand Junction Canal Co., 15 Beav. 260; Allen v. San Jose Land & W. Co., 92 Cal. 138, 28 Pac. Rep. 215; Gregory v. Nelson, 41 Cal. 278; Merritt v. Parker, 1 N. J. L. 460, 466;

Johnston v. Hyde, 32 N. J. Eq. 446; Jaqui v. Johnson, 27 N. J. Eq. 526, 532.

⁵ Onthank v. Lake Shore & M. S. R. Co., 71 N. Y. 194, affirming 8 Hun, 131; Jones v. Percival, 5 Pick. 485; Bannon v. Angier, 2 Allen, 128; Jen-nison v. Walker, 11 Gray, 423; Chandler v. Jamaica Pond Aqueduct Co., 125 Mass. 544, 550; Whittier v. Cocheco Manuf. Co., 9 N. H. 454, 32 Am. Dec. 382.

one who has an equal right in the way.¹ Evidence of an oral agreement made before or at the time of the making of the deed which conferred the easement is inadmissible.²

The enlargement of a drain, reserved by a grantor in a conveyance of a part of his land, at the joint expense of himself and of the grantor, does not destroy its identity, so as to destroy the easement reserved.³

Simultaneous conveyances were made of two mills, each referring to the same plan, upon which was marked a way leading to one of the mills, and a canal leading across that way to the other mill. The mode of conveying the water to the latter mill was at the time of the conveyances by means of a penstock which did not interfere in any manner with the way, and there was no intimation in the deeds of any contemplated change in the passage of the water which would make the enjoyment of the right of way more expensive or less beneficial. It was held that the owner of the canal, who also owned the lands, had no right to convert the underground penstock into an open canal and so make the way across it impassable.⁴

III. *Alterations by the Owner of the Servient Estate.*

830. The owner of the servient estate is not allowed to materially alter the character of the servitude, although such alteration would not result in any damage to the dominant estate, but even might be a benefit to it.⁵

The owners of the fee subject to a right of way have no right to make any change in its grade which will make the way less convenient to any appreciable extent, and where it is found that the proposed change of grade would interfere with such easement, an injunction should be granted.⁶ He has the right to level and work the surface of the way so as to make it convenient and useful as a

¹ Killion v. Kelley, 120 Mass. 47; Nute v. Boston Co-Op. Build. Co., 149 Mass. 465, 21 N. E. Rep. 881; Kelley v. Saltmarsh, 146 Mass. 585, 16 N. E. Rep. 460; Meehan v. Barry, 97 Mass. 447; Freeman v. Sayre, 48 N. J. L. 37, 2 Atl. Rep. 650.

² Kelley v. Saltmarsh, 146 Mass. 585, 16 N. E. Rep. 460.

³ Jones v. Adams, 162 Mass. 224, 38 N. E. Rep. 437.

⁴ Richardson v. Bigelow, 15 Gray, 154.

⁵ Allen v. San Jose Land & W. Co., 92 Cal. 138; Gregory v. Nelson, 41 Cal. 278; Roberts v. Roberts, 55 N. Y. 275.

⁶ Vinton v. Greene, 158 Mass. 426, 33 N. E. Rep. 607; Killion v. Kelley, 120 Mass. 47, 52; Kelley v. Saltmarsh, 146 Mass. 585, 16 N. E. Rep. 460; Nute v. Building Co., 149 Mass. 465, 471, 21 N. E. Rep. 881; Haslett v. Shepherd, 85 Mich. 165, 48 N. W. Rep. 533.

way, as far as he can do so without injuring any persons who have the right to use the way; but the latter cannot be compelled to submit to any change in the way injurious to their interests against their wills.¹

The owner of the servient estate cannot change the location of a way and substitute another way for it without the consent of the owner of the easement.²

But if the owner of the servient estate makes a material alteration in an easement, such, for instance, as a right of way, and the owner of the easement uses it in its altered condition for such a length of time as to show his acquiescence in the alteration, he cannot afterwards complain of it.³

831. The owner of the soil is under no obligation to make or repair a way or other easement to which his land is subject. That duty belongs to the owner of the easement.⁴

Where land was conveyed with the right to use a well upon the grantor's adjoining land, so long as the grantee, his heirs and assigns shall pay one-half the expense of keeping the well in repair, and the servient estate was afterwards transferred to another, who made repairs upon the well, and the owner of a dominant estate refused to pay half the expense, it was held that the latter could not excuse himself from such payment on the ground that before the owner of the servient estate acquired his title, he had himself made repairs upon the well and had thus contributed his share towards the repairs. The grantor entered into no covenant, express or implied, to contribute to the payment for repairs which the grantee might make upon the well. The grantor and his successors might make repairs for their own convenience, but the deed imposed upon them no obligation to do so. The owner of the dominant estate might

¹ Kelley v. Saltmarsh, 146 Mass. 585, 16 N. E. Rep. 460.

² Manning v. Port Reading R. Co., 54 N. J. Eq. 46, 33 Atl. Rep. 802; Smith v. Lee, 14 Gray, 473; Chandler v. Jamaica Pond Aqueduct, 125 Mass. 544, 550.

³ Betts v. Badger, 12 Johns. 222, 7 Am. Dec. 309; Fitzpatrick v. Boston & M. R. Co., 84 Me. 33, 24 Atl. Rep. 432.

⁴ Osborn v. Wise, 7 Car. & P. 761; Taylor v. Whitehead, Doug. 745; Rider v. Smith, 3 T. R. 766; Herman v.

Roberts, 119 N. Y. 37, 42, 23 N. E. Rep. 442; Fritcher v. Anthony, 20 Hun, 495, 499; Williams v. Safford, 7 Barb. 309; Wynkoop v. Burger, 12 Johns. 222; McMillan v. Cronin, 75 N. Y. 474, 57 How. Pr. 53; Harvey v. Crane, 85 Mich. 316, 48 N. W. Rep. 582; Prescott v. White, 21 Pick. 341, 32 Am. Dec. 266; Jones v. Percival, 5 Pick. 485, 16 Am. Dec. 415; Puryear v. Clements, 53 Ga. 232; Walker v. Pierce, 38 Vt. 94; Ballard v. Butler, 30 Me. 94.

make repairs for his own convenience, but he could not compel the owner of the servient estate to contribute to the expense of such repairs.¹

The fact that the owner of the easement has a right to call upon the servient estate for one-half of the expense of keeping a race-way or other water-way in repair, does not relieve him from the obligation to see that proper repairs are made. Although the owner of the servient estate might make the necessary repairs and recover one-half of the expense of so doing, yet such remedy is accumulative only, and is not a bar to an action for damages and does not relieve the owner of the easement from the duty of making the repairs, or relieve him from liability for damages of his failure to do so.²

Of course, the owner of the servient estate may bind himself by covenant to keep the easement in repair, and in such case he is not relieved of the burden on the ground that the dominant owner has himself, for many years, made the repairs.³

832. The owner of the servient estate has the right to improve his estate, and to this end to change any structure connected with the easement, so as to make it more ornamental, provided he does not impair the easement or make it less fit for the service for which it was acquired. Thus, where an easement in the use of an aqueduct was acquired by prescription, and there was a covering over the reservoir upon the servient estate, it was held that the form of the covering was not fixed by the prescription, but that this might be reasonably changed by the landowner in the improvement of his grounds, no injury being done to the aqueduct. "The right of the easement owner and the right of the landowner are not absolute, irrelative and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both. The forms and materials of the reservoir cover and water pipes are restricted, not by those heretofore used, but by the reasonable necessity of the case. The substance of the easement is shown by the usage; but the form of the cover is a question of reasonable necessity. And in determining that question the rights of the owner of the land are to be considered, as well as the rights of the owners of the

¹ *Sherman v. Congdon*, 56 Conn. 355, 15 Atl. Rep. 754. And see *Doane v. Badger*, 12 Mass. 65; *Ballard v. Butler*, 30 Me. 94.

² *Fritcher v. Anthony*, 20 Hun, 495.

³ *Holmes v. Buckley*, 1 Eq. Cas. Abr. 27. And see *Rider v. Smith*, 3 T. R. 766.

easement. He cannot compel them to adopt a form unreasonably inconvenient; and they cannot compel him to submit to the disfigurement of his grounds by a structure unreasonably unsightly and repulsive. The form may be a matter of great consequence to him, and of no interest to them.”¹

833. The owner of a servient estate, over which there is an easement to maintain a water-ditch, has the right to use the land for the pasturage of cattle in the ordinary manner, and is under no obligation to fence the ditch or to cover it over so that his cattle cannot tread it down, not to keep it clear and unobstructed so that water will continuously run through it.² “The general rule is, that any man may use his own land in his own way, provided he does not use it negligently, so as to injure his neighbor. And the rule is, also, that where one man has an easement over the land of another, the duty of keeping the easement in repair rests upon its owner, and when repairs are necessary, he may enter on the servient tenement to make them.”³

¹ *Olcott v. Thompson*, 59 N. H. 154, 156, 47 Am. Rep. 184, per Doe, C. J.

³ *Durfee v. Garvey*, 78 Cal. 546, 551, 21 Pac. Rep. 302, per Belcher, C. C..

² *Durfee v. Garvey*, 78 Cal. 546, 21 Pac. Rep. 302.

CHAPTER XVIII.

EXTINCTION.

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| <p>I. By unity of the dominant and servient tenements, 834-837.</p> <p>II. By destruction of that upon which the easement depends, 838-844.</p> | <p>III. By voluntary abandonment or incompatible acts, 845-862.</p> <p>IV. By non-user and adverse possession, 863-871.</p> |
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834. An easement may be extinguished in several ways. In California, Montana, North Dakota, Oklahoma and South Dakota, the statutes declare that a servitude is extinguished: 1. By the vesting of the right to the servitude and the right to the servient tenement in the same person; 2. By the destruction of the servient tenement; 3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or, 4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.¹

The subject is here considered in the order in which the modes of extinguishment are stated in these statutes.

I. By Unity of the Dominant and Servient Tenements.

835. The unity of the dominant and servient estates in the same person extinguishes the easement appurtenant to the dominant estate.² No person can have an easement in land which he himself

¹ Cal. Civ. Code, §§ 801-811; Montana Civ. Code 1895, §§ 1250-1260; North Dak. R. Code 1895, §§ 3351-3361; Oklahoma Comp. Stats. 1893, §§ 3724-3734; S. Dak. Comp. Laws 1887, §§ 2760-2770.

² James v. Plant, 4 Ad. & El. 749, 6 N. & M. 282, 10 Eng. Rul. Cas. 279; Whalley v. Thompson, 1 Bos. & P. 371; Bright v. Walker, 1 Cr. M. & R. 211, 219; Dynevor v. Tennant, 13 App. Cas. 279; Hazard v. Robinson, 3 Mason, 272; Manning v. Smith, 6 Conn. 289;

Pierce v. Selleck, 18 Conn. 321; Robb v. Hannah (Ky.), 14 S. W. Rep. 360; Strohmeir v. Leahy (Ky.), 9 S. W. Rep. 238; Dority v. Dunning, 78 Me. 381, 6 Atl. Rep. 6; Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748; McTavish v. Carroll, 7 Md. 352, 61 Am. Dec. 353; Capron v. Greenway, 74 Md. 289, 22 Atl. Rep. 269; Duval v. Becker, 81 Md. 537, 32 Atl. Rep. 308; Grant v. Chase, 17 Mass. 443, 9 Am. Dec. 161; Gayetty v. Bethune, 14 Mass. 49, 7 Am. Dec. 188; Hancock v. Wentworth,

owns. If the person who has acquired both the dominant and servient estates conveys away the latter without reserving to himself the pre-existing easement, he thereby abandons the easement in so far as it was enjoyed by him, for the reason that a grantor is not allowed to derogate from his own grant.¹

836. Unity of title of the two estates will not extinguish an easement unless the ownership of the two estates be co-extensive, equal in validity, quality, and all other circumstances of right.² If one estate is held in fee and the other for a term of years, though this be for five hundred years, or for nine hundred and ninety-nine years, there is no unity of possession that will extinguish an easement of one estate as against the other; but the unity of possession in such case will only suspend the easement during the time of such unity of possession.³ And so if a person holds one estate in severalty and only a fractional part of another, the unity of these titles in him does not extinguish an easement.⁴ “If a way has become appurtenant to an estate, and the servient estate becomes the property of one who is also a joint owner with others of the dominant estate, the way is not extinguished. The manifest wrong which such a merger would do to the owners of the dominant estate is a sufficient argument against the extinguishment, and the technical doctrine of merger carried to its fullest extent would extinguish only the right of him who has an interest in both estates. The right of the other joint owners would remain unimpaired, and thus the

5 Met. 446; *Atlanta Mills v. Mason*, 120 Mass. 244; *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. Rep. 509; *Friedlander v. Del. & H. Canal Co.*, 58 Hun, 605, 34 N. Y. St. 650, 13 N. Y. Supp. 323; *Parsons v. Johnson*, 68 N. Y. 62, 66; *Fritz v. Tompkins*, 18 Misc. 514, 41 N. Y. Supp. 985; *Denton v. Leddell*, 23 N. J. Eq. 567; *Brakely v. Sharp*, 9 N. J. Eq. 9; *McAllister v. Devane*, 76 N. C. 57; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Howell v. Estes*, 71 Tex. 690, 12 S. W. Rep. 62; *Miller v. Lapham*, 44 Vt. 416; *Plimpton v. Converse*, 42 Vt. 712.

¹ *Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404; *Duval v. Becker*, 81 Md. 537, 32 Atl. Rep. 308; *Huttemeier v. Albro*, 18 N. Y. 48; *Parsons v. John-*

son, 68 N. Y. 62, 23 Am. Rep. 149; *Scrymser v. Phelps*, 33 Hun, 474, 62 How. Pr. 1.

² *Thomas v. Thomas*, 2 Cr. M. & R. 34; *Dority v. Dunning*, 78 Me. 381, 6 Atl. Rep. 6, per Foster, J.; *Ritger v. Parker*, 8 Cush. 145, 147, 54 Am. Dec. 744; *Tyler v. Hammond*, 11 Pick. 193; *Atlanta Mills v. Mason*, 120 Mass. 244.

³ *Thomas v. Thomas*, 2 Cr. M. & R. 34; *Dority v. Dunning*, 78 Me. 381, 6 Atl. Rep. 6; *Hollenbeck v. McDonald*, 112 Mass. 247; *Gay, Petitioner*, 5 Mass. 419; *Chapman v. Gray*, 15 Mass. 439; *Brewster v. Hill*, 1 N. H. 350.

⁴ *Atlanta Mills v. Mason*, 120 Mass. 244.

way would be preserved as appurtenant to the property, and when by sale or otherwise the owner of the servient estate ceases to be joint owner in the dominant estate, the temporary and partial merger would cease and be as though it had never been.”¹

837. An easement may be revived, after it has been extinguished by the union of the dominant and servient tenements in one owner, by their subsequent severance, provided the easement is apparent, continuous and essential to the enjoyment of the dominant tenement.²

II. *By Destruction of that upon which the Easement Depends.*

838. An easement in a building is extinguished by the destruction of the building, so that there is nothing upon which it can operate. An easement is an interest in real estate and survives the destruction of a part of the servient estate when there is anything remaining upon which the dominant estate may operate. If the right is a mere license, the fact of destruction is not material, since the denial of the right works a revocation, there being no such right as a license not subject to revocation and falling short of an easement. But a reservation on the sale of half a lot improved by a double building, of a right of way over the stairways of the other half, such as would be necessary to the proper use of the second story, does not create an interest in the soil which survives the destruction of the building. The court so deciding say: “We feel entirely certain that the reservation, in the form in which it is brought to us, was not intended to create an interest in the soil; and if it possessed the quality of an easement, in that it became an interest in real estate, it was only to the extent of affording the use of the stairways and hall in the building as it existed, and independently of any right to or interest in the soil. If this was the extent of the interest, it follows that the destruction of the building destroyed the right as effectually as if the interest had been in the soil, and the floods had carried away the soil; nothing would remain upon which the right could operate. A new structure would not

¹ Bradley Fish Co. v. Dudley, 37 Conn. 136, 144, per Seymour, J.

² See §§ 126-157; Ferguson v. Witsell, 5 Rich. 280; Rightsell v. Hale, 90 Tenn. 556, 18 S. W. Rep. 245; Brown v. Berry, 6 Coldw. 98; Miller v. Lap- ham, 44 Vt. 416; McCarty v. Kitchen-

man, 47 Pa. St. 239; Kieffer v. Imhoff, 26 Pa. St. 438; Hurlburt v. Firth, 10 Phila. 135; Worne v. Marsh, 6 Phila. 33; Grant v. Chase, 17 Mass. 443, 9 Am. Dec. 161; *In re* Bull, 15 R. I. 534, 10 Atl. Rep. 484.

recreate the right, for such right had been destroyed, and not simply suspended, as would probably have been the case if the right had attached to the land.”¹

839. An easement to use a stairway in a building on an adjacent lot terminates on the destruction of the building, although the easement was created in a deed of conveyance in fee. The owner of a building containing a store conveyed to the owner of an adjoining store the right to use a stairway in the first-mentioned store in common with the grantor and his tenants for the purpose of going to and returning from the rooms in the upper part of both stores. There was a party-wall between the two buildings. The building in which the stairway existed was afterwards destroyed; and it was held that the easement in the stairway thereupon ceased. The stairway in which the easement was given was the stairway in the building then standing. The language used in creating the easement was construed not to convey a right in the space occupied by the stairs, or a right to rebuild them after their destruction, or a right in a new stairway in a new building thereafter erected on the lot by the grantor or his assigns.²

840. The destruction of a party-wall destroys an easement therein created by building the wall along the dividing line of two lots and conveying one or both of the buildings by deeds describing this line as running through the centre of the party-wall.³ “It is to be considered that the necessity which lies at the foundation of the right arises from the existing relations of artificial structures, for the time being constituting part of the freehold, but liable to be destroyed by the action of the elements or by mere lapse of time. When thus destroyed, it is fair to presume that the parties intend, in the absence of any agreement, that the easement shall end with

¹ Shirley v. Crabb, 138 Ind. 200, 204, 37 N. E. Rep. 130.

² Shirley v. Crabb, 138 Ind. 200, 37 N. E. Rep. 130, 46 Am. St. Rep. 376; Thorn v. Wilson, 110 Ind. 325, 59 Am. Rep. 209; Douglas v. Coonley, 84 Hun, 158, 32 N. Y. Supp. 444; Hahn v. Baker Lodge, 21 Oreg. 30, 27 Pac. Rep. 166, 28 Am. St. Rep. 723.

³ Hoffman v. Kuhn, 57 Miss. 746, 34 Am. Rep. 491; Heatt v. Ogden, 121 N. Y. 386, 24 N. E. Rep. 841; Ogden v.

Jennings, 62 N. Y. 526; Brondage v. Warner, 2 Hill, 145; Sherred v. Cisco, 4 Sandf. 480; Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632; but see Pope v. O'Hara, 48 N. Y. 446; Pierce v. Dyer, 109 Mass. 374, 12 Am. Rep. 716; Heatt v. Morris, 10 Ohio St. 523, 78 Am. Dec. 280; Stevenson v. Wallace, 27 Gratt. 77; Duncan v. Ro-decker, 90 Wis. 1, 62 N. W. Rep. 533, per Newman, J.

See §§ 706-724.

the necessity that created it. There can be by implication no mutual easement of perpetual support applicable to future structures.”¹

The fact that the foundation wall remains after the destruction of the buildings does not suffice to preserve unimpaired the right to a reconstruction of a party-wall. In the early case of *Sherred v. Cisco*² the facts were quite similar to those in *Heartt v. Kruger*.³ Adjoining buildings were destroyed by fire, leaving nothing of a party-wall but the stone foundation. The plaintiff rebuilt on his lot; and, when the defendant also rebuilt, he made use of the wall for his buildings, which plaintiff had erected on the old foundation. Thereupon, plaintiff sued to recover of defendant his contribution towards the expense of the erection, and failed in his suit. In his opinion, Judge SANDFORD held that the agreement under which the party-wall had been built related to that wall only; and he said “that, when two owners of adjoining city lots unite in building two stores with a party-wall, we have no right to infer from that act an agreement binding upon them, and their heirs and assignees, to the end of time, to erect another like party-wall, at their mutual expense, when that one is casually destroyed, and so on, as often as the new one shares the same fate.” The principle of that decision was declared to be correct by the Court of Appeals in *Heartt v. Kruger* just cited,³ the court saying: “The implied agreement that the party-wall existing at the time of the conveyances of the two lots by their common owner should continue in its use and occupation as such cannot be extended so as to relate to a changed condition of things, caused by the casual destruction of the wall and buildings. * * * The rule which, with the cessation of the

¹ *Pierce v. Dyer*, 109 Mass. 374, 376, per Colt, J.

² 4 Sandf. 480, 488.

³ *Heartt v. Kruger*, 121 N. Y. 386, 24 N. E. Rep. 841, per Gray, J.

In *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632, Judge Denio, in his opinion upon the case, approves of Judge Sandford's opinion in the case cited. He held that, upon the occurrence of a state of affairs rendering the party wall useless in its then condition, “the mutual easements have become inapplicable, and that each proprietor may build as he pleases upon his own land, without any obligation to accom-

modate the other.” Judge Denio further remarked that “in the changing condition of our cities and villages, it must often happen, as it did actually happen in this case, that edifices of different dimensions, and an entirely different character, would be required; and it might happen, too, that the views of one of the proprietors as to the value and extent of the new buildings would essentially differ from those of the other, and the division wall which would suit one of them would be inapplicable to the objects of the other.”

necessity for the existence of a right, abrogates the right itself, is supported by the reason of the thing, as well as by legal principles. The mutual easements existed by force of the situation at the time of the severance of the ownership of the two lots, and with the change in that situation produced by the casual destruction of the buildings, the reason for their existence ceased. Thenceforth they were inapplicable, and the lands were free for the lawful uses of their owners. The easement was measured in its extent and duration by the existence of the necessity for it. When the necessity ceased, as it did by the destruction of the buildings and wall, the rights resulting from it ceased also." The learned judge further said: "The defendant, insists that the wall did not cease to be a party-wall after the fire, and he cites in support of his position *Brondage v. Warner*,¹ His argument amounts to this, in effect: That, if any fragment of the wall was left, or if only the foundation or cellar wall upon which it stood remained, in the legal vision the party-wall still stood, with its accompanying burden or benefit to the adjoining properties. But that I consider a doctrine untenable, and clashing with the doctrine of property rights in land. *Brondage v. Warner*, affords no support for it; for there the defendant's right to use and occupy the wall in question lay in grant. The deed under which the defendant in ejectment claimed the right to continue to use the wall granted the right to build upon and occupy it. That had been done. The fire which had destroyed the plaintiff's store left the wall standing, which was occupied by the defendant. It still answered the purpose for which its use had been deeded, and therefore the court held that the right to continue to use it had not been affected."

841. An easement in a way for access to a house or other building appurtenant to the land is not lost by the destruction of the building standing at the time of the grant or reservation.²

But if the easement is appurtenant to the building only and not to the land, the easement is lost when the building is destroyed or goes to decay, and is not rebuilt. Thus the grant of a mill with an easement to take water for operating the mill, is a different thing from a grant of land with an easement for its enjoyment for mill

¹ 2 Hill, 145.

² *Henning v. Burnet*, 8 Exch. 187; *Pierce v. Dyer*, 109 Mass. 374, 377, 12 Am. Rep. 716; *Crain v. Fox*, 16 Barb. 184; *Chew v. Cook*, 39 N. J. Eq. 478; *Bangs v. Parker*, 71 Me. 458; 396.

purposes. "The latter may be made available at any time and by different mills in succession. But the grant of a particular mill with an easement for its enjoyment is a grant of the easement only so long as it can be used with the mill. The easement is appurtenant to the building, and when the building ceases to exist, the easement comes to an end; not by abandonment or extinguishment, but by the inherent limitation of the grant itself."¹

842. An easement granted or reserved for a purpose definitely declared, ceases when this purpose no longer exists.²

An easement granted for a public landing on the bank of a river ceases with the abandonment of all commerce on the river for more than thirty years.³

843. An easement is extinguished when the estate to which it is appurtenant ceases to exist. A right of way assigned to a widow with her dower ceases with the estate in dower.⁴

Where the owner of land fronting on the Mississippi river conveyed a portion of it distant a quarter of a mile from the river with an easement in the river front, and the land conveyed and the land intervening between that and the river were washed away by the encroachments of the river, it was held that the easement in the river front was extinguished by the destruction of the lot to which it was appurtenant.⁵

An easement in a way or in a dock, is extinguished by the taking of the property by a town or city for a street under authority conferred by statute. The enjoyment of the easement is thus rendered impossible and is thereby extinguished.⁶ The remedy of the owner of the easement for its destruction is against the town or city.

A city, for the purpose of widening a street, purchased a lot of land with a building thereon, which had by prescription an easement in a chimney standing on an adjoining lot of land, took down

¹ Day v. Walden, 46 Mich. 575, 586, 10 N. W. Rep. 26, per Cooley, J.

² Hahn v. Baker Lodge, 21 Oreg. 30, 27 Pac. Rep. 166; Jones v. Van Bochoore, 103 Mich. 98, 101, 61 N. W. Rep. 342; Batchelder v. State Capital Bank, 66 N. H. 386, 22 Atl. Rep. 592; Roanoke Inv. Co. v. Kansas City & S. E. Co., 108 Mo. 50, 17 S. W. Rep. 1000; Freedom v. Norris, 128 Ind. 377, 27 N. E. Rep. 869.

³ Freedom v. Norris, 128 Ind. 377, 27 N. E. Rep. 869.

⁴ Hoffman v. Savage, 15 Mass. 130.

⁵ Weis v. Meyer, 55 Ark. 18, 17 S. W. Rep. 339.

⁶ Central Wharf v. India Wharf, 123 Mass. 567; Hancock v. Wentworth, 5 Met. 446; Mussey v. Union Wharf, 41 Me. 34; Ballard v. Butler, 30 Me. 94.

the building, appropriated the greater part of the land to the widening of the street, allowed the rest of the land to lie vacant for six years, and then conveyed it by deed of quit-claim. It was held that the easement in the chimney was lost by abandonment, and did not pass to the grantee.¹

844. The owner of the land, whoever he may be, may take advantage of a forfeiture by the person entitled to the easement.² Though it is the rule that none but the grantor or his heirs can maintain an action to declare a forfeiture for a breach of a condition, the right to take advantage of such a breach being neither assignable nor severable,³ this rule applies only to estates in fee.⁴ In the case of an easement the rule must be different, as the title is never divested.

III. *By Voluntary Abandonment or Incompatible Acts.*

845. The owner of an easement may abandon his right so as to relieve the servient estate of the encumbrance.⁵

An easement is extinguished by a release by the owner of it to the owner of the servient estate;⁶ but as an easement cannot be created by parol, it cannot be extinguished by parol merely.⁷ If the easement has become a fixed right appurtenant to the land of the dominant owner, the right cannot be affected by a notice to him to discontinue the use of the easement given by the owner of the servient tenement.⁸

A release by an abutting owner to an elevated railroad company of all easements or rights appurtenant to the premises which had

¹ Canny v. Andrews, 123 Mass. 155.

² Reichenbach v. Washington Short Line R'y Co., 10 Wash. 357, 38 Pac. Rep. 1126.

³ Jones on Real Property, § 728.

⁴ Nicoll v. New York & E. R. Co., 12 N. Y. 121; Cook v. Wardens, etc., of St. Paul's Church, 5 Hun, 293; Cole v. Irvine, 6 Hill, 634; Schulenberg v. Harriman, 21 Wall. 44; Ruch v. Rock Island, 97 U. S. 693; Reichenbach v. Washington Short Line R'y Co., 10 Wash. 357, 38 Pac. Rep. 1126.

⁶ Vogler v. Geiss, 51 Md. 407; King v. Murphy, 140 Mass. 254, 4 N. E.

Rep. 566; Canny v. Andrews, 123 Mass. 155; Pope v. Devereux, 5 Gray, 409; Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399; Crain v. Fox, 16 Barb. 184; Monaghan v. Memphis Fair Co., 95 Tenn. 108, 31 S. W. Rep. 497.

⁷ Hamilton v. Farrar, 128 Mass. 492; McAllister v. Devane, 76 N. C. 57; Sidwell v. Greig, 17 Misc. 165, 40 N. Y. Supp. 968.

⁸ Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399; Longendyck v. Anderson, 59 How. Pr. 1.

⁸ Held v. McBride, 3 Supr. Ct. (Pa.) 155, 39 W. N. Co. 284.

been taken and were affected by the maintenance and operation of the road, and from all causes of action therefor, past present and future, with a consent to a perpetual maintenance and operation of the road, effects an abandonment of the abutting owner's easements of light, air and access afforded by the street in front of the premises.¹

846. An easement is not extinguished or renounced by a parol agreement so long as this is not executed.³

But a parol agreement carried into execution may be evidence of the abandonment of an easement. Where the agreement was to discontinue an old way, and substitute a different one, and this was carried into effect, it then became competent evidence of a surrender of the old right of way.⁴ "A party having once given his free consent to forego the use of the easement, either temporarily or permanently, and suffered other persons to act upon the faith of that agreement or consent, and to incur expense in doing the very act to which his consent was given, it is then too late for him, or those claiming under him, to retract such consent, or to throw on those relying upon his good faith the burthen of restoring things to their former state and condition. This is the just and equitable principle now firmly established, and it is applied as well in courts of law as in courts of equity."⁵ It was held, however, by the Court of Common Pleas in England that a parol agreement for the substitution of a new way for an old prescriptive way, and a consequent discontinuance to use the old way, afford no evidence of an abandonment thereof.²

Where the owner of land across which another had a right of way obstructed the way by erecting a shed, and the owner of the easement saw the shed in process of erection and made no objection, but later called the attention of the landowner to the matter and he promised to remove the shed upon request, it was held the circumstances did not amount to a license to erect the shed, especially as it appeared that the person entitled to the way did not know the exact location of the shed in reference to the right of way.⁶

¹ Ward v. Met. El. R. Co., 152 N. Y. Dec. 399; Erb v. Brown, 69 Pa. St. 39, 46 N. E. Rep. 319; White v. Manhattan R. Co., 139 N. Y. 19; Foote v. Met. El. R. Co., 147 N. Y. 367, 42 N. E. Rep. 181, 70 N. Y. St. Rep. 27, 28 Chic. L. N. 119.

⁴ Pope v. Devereux, 5 Gray, 409.

⁵ Vogler v. Geiss, 51 Md. 407, 411, per Alvey, J.

² Lovell v. Smith, 3 C. B. N. S. 120.

³ Pope v. Devereux, 5 Gray, 409; ⁶ Collins v. St. Peters, 65 Vt. 618, 27 Atl. Rep. 425.

Dyer v. Sanford, 9 Met. 395, 43 Am.

847. An easement may be extinguished, revoked or modified by a parol license granted by the owner of the dominant estate and acted upon by the owner of the servient estate.¹ If one entitled to cross the tracks of a railroad at grade orally agrees that the railroad may close up this crossing upon condition that the company provides another suitable way, and the company accordingly constructs the way and transfers the title to the way to the persons entitled to use it, the right to use the crossing is extinguished. "If the extinguishment of an easement by the execution by the owner of the servient estate of a license which prevents the further enjoyment of the easement rests on the ground that the owner of the easement intentionally abandons it, — and where there is a complete extinguishment it may well rest upon that ground, — his intention is conclusively presumed in favor of the owner of the servient tenement who executed the license, because between these parties, when one acts upon the license of the other, the manifest and apparent intention which is acted upon must control their rights, whatever the secret intention of the licensor may be."²

The owner of a mill privilege gave the owner of lands flowed thereby an oral license to erect a dam on the land of the latter, and also to dig a ditch across the land of the mill-owner to drain the water from a part of the land overflowed; and under this license the dam was erected and the ditch dug. The mill-owner, after many years, undertook to revoke the whole license, prostrating the dam and closing up the ditch. The land-owner thereupon dug a ditch on his own land to draw off the water thrown upon it by the broken dam, which resulted in diverting the water from the mill-pond. In a suit by the mill-owner against the land-owner for this injury, it was held that the mill-owner lost his right to flow the land by his oral license to the land-owner to erect a dam to prevent the overflow of his land. The mill-owner, however, could revoke

¹ Winter v. Brockwell, 8 East, 308; Morse v. Copeland, 2 Gray, 302; Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399; Fremont v. June, 8 Ohio C. C. 124; Addison v. Hack, 2 Gill, 221, 41 Am. Dec. 421; Crain v. Fox, 16 Barb. 184.
² Boston & Prov. R. Co. v. Doherty, 154 Mass. 314, 317, 28 N. E. Rep. 277.
 Liggins v. Inge, 7 Bing. 682; Boston & Prov. R. Co. v. Doherty, 154 Mass. 314, 28 N. E. Rep. 277; King v. Murphy, 140 Mass. 254, 4 N. E. Rep. 566; Canny v. Andrews, 123 Mass. 155; Warshauer v. Randall, 109 Mass. 586; Pope v. Devereux, 5 Gray, 409; Curtis v. Noonan, 10 Allen, 406, 409;

the license to cut a ditch through his land, and therefore his act in stopping up the ditch was justifiable.¹

848. If the obstructions to a right of way authorized by mere parol license be only temporary, or only partial in effect, the easement is merely suspended or modified during the existence of the obstructions placed upon the way in pursuance of such license. If the license be for only a specific act, the licensee cannot erect another obstruction of the same or of a different kind without a new license, and consequently such temporary or partial obstructions do not extinguish the easement. In such case, after the removal of the obstructions, the right to use the easement as formerly is fully restored.²

A person who accepts a deed with knowledge of the existence of a private alley over the land conveyed and other adjoining land designed for the use of the several owners, although the deed contains no reference to the alley, will not be held to have abandoned the alley by reason of such acceptance, or because he abstained from fencing off the alley, or because he did not remove an apple tree which was standing in the space covered by the alley when he took the conveyance, or because he erected a grape arbor partly within the space covered by the alley.³

849. Abandonment of an easement is a matter of intention on the part of the person having the right, and such intention may appear by his acts as well as by his declarations.⁴ Thus, where one had a private right of way, and a highway was laid out between the same termini which was equally convenient for him, and was

¹ *Morse v. Copeland*, 2 Gray, 302, 305. Metcalf, J., said: "The authorities * * * show that the rule, sometimes laid down in the books, that a license executed cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement, but to licenses which, if given by deed, would extinguish or modify an easement. They also show that the distinction, sometimes taken in the books, between a license to do acts on the licensee's own land, and a license to do acts on the licensor's land is the same distinction that is made between licenses which, if held valid,

would create, and licenses which extinguish or modify, an easement. Generally, if not always, a license which, when executed, extinguishes or modifies an easement, is, from the nature of the case, a license to do acts on the servient tenement—the tenement of the licensee."

² *Vogler v. Geiss*, 51 Md. 407. See *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399.

³ *Ermentrout v. Stitzel*, 170 Pa. St. 540, 33 Atl. Rep. 109.

⁴ *Jamaica Pond Aqueduct Co. v. Chandler*, 121 Mass. 3.

used by him, these facts together with his entire non-user of the private way were regarded as strong, but not conclusive, evidence of an abandonment.¹

Whether there has been abandonment of an easement is a question of fact and of intention for the determination of the jury.²

850. The burden of proof to show an abandonment of an easement is upon the party claiming such abandonment and he must establish the fact by clear and unequivocal evidence.³

851. To make out a voluntary abandonment of an easement the proof must go to this extent, as declared by Chief Justice Shaw: "First, that the acts relied on were voluntarily done by the owner of the dominant tenement, or by his express authority; secondly, that such party was the owner of the inheritance, and had authority to bind the estate by his grant or release; and thirdly, that the acts are of so decisive and conclusive a character as to indicate and prove his intent to abandon the easement."⁴

Testimony of a former owner of the dominant estate that when he owned the easement he orally relinquished it and ceased to use it, is admissible upon the question of abandonment.⁵

852. Any act of the dominant owner that is inconsistent with his further enjoyment of the right is an abandonment of it.⁶ "If the owner of the dominant grants a license to the owner of the servient tenement to erect a wall which necessarily obstructs the enjoyment of the easement, and it is erected accordingly, it may amount to proof of an abandonment of the easement. It is not a release,

¹ Foote v. Metropolitan El. R. Co., 147 N. Y. 367, 42 N. E. Rep. 181, 70 N. Y. St Rep. 27; Snell v. Levitt, 110 N. Y. 595, 18 N. E. Rep. 370; Vogler v. Geiss, 51 Md. 407.

² King v. Murphy, 140 Mass. 254, 4 N. E. Rep. 566; Polson v. Ingram, 22 S. C. 541; Parkins v. Dunham, 3 Strobb. 224; Vogler v. Geiss, 51 Md. 410; Cooper v. Smith, 9 S. & R. 26, 11 Am. Dec. 658.

³ Waring v. Crow, 11 Cal. 366; Richardson v. McNulty, 24 Cal. 339; Beaver Brook Reservoir Co. v. St. Vrain Reservoir Co. 6 Colo. App. 130, 40 Pac. Rep. 1066.

⁴ Dyer v. Sanford, 9 Met. 395, 402, 43

Am. Dec. 399, citing Moore v. Rawson, 3 Barn. & Cres. 332, and 5 Dowl. & Ryl. 234. And see Hayford v. Spokesfeld, 100 Mass. 491; Smyles v. Hastings, 22 N. Y. 217; Smith v. Worn, 93 Cal. 206, 28 Pac. Rep. 944.

⁵ Warshauer v. Randall, 109 Mass. 586; King v. Murphy, 140 Mass. 254, 4 N. E. Rep. 566.

⁶ Dyer v. Sanford, 9 Met. 395, 402, 43 Am. Dec. 399, per Shaw, C. J. And see King v. Murphy, 140 Mass. 254; Stein v. Dahm, 96 Ala. 481, 11 So. Rep. 597; Corning v. Gould, 16 Wend. 531; Ballard v. Butler, 30 Me. 94; Taylor v. Hampton, 4 McCord (S. C.), 96.

because it is by parol. But it results from the consideration that a license, when executed, is not revocable; and if the obstruction be permanent in its nature, it does, *de facto*, terminate the enjoyment of the easement. But the license is for the specific act only; and if, when executed, it is of such a nature as, *de facto*, to destroy the easement, but is only temporary in its nature, or limited in its terms, then, as the easement is not released, when the obstruction erected in pursuance of such specific license is removed, the owner of the servient tenement cannot erect another obstruction of the same, or of a different kind, without a new license.”

Where one having a way leading from his house and barn on his land over the land of his neighbor to a highway, removed the house and barn, ploughed and planted the land, and fenced up the end of the way, it was held, twelve years afterwards, that the way had been abandoned and lost.¹ Where one had an easement of light in his neighbor's land enjoyed by means of a window opening in an ancient wall of his house, which he pulled down and rebuilt without the window, and his neighbor afterwards built so as to intercept the light, it was held, after seventeen years, that the easement had been abandoned and lost.²

But the owner of an easement does not forfeit or destroy his right to it by claiming a right to the fee of the servient estate, and taking possession of it. His attempt to use the land as owner of the fee does not prove an intent to abandon the easement. No acts of his will extinguish his easement except such as indicate his intention to abandon it, unless other persons have been led by such acts to believe the right abandoned, and to act upon such belief.³

One having a right of way over another's land does not, by closing a gate and making an opening to the way at another place, abandon the way as originally laid out, although he cannot insist upon the change without the owner's consent.⁴ Neither does the owner of such a right of way extinguish it by erecting a board fence five feet high on the boundary of his land extending across such way or by subsequently placing palings three or four feet high on top of this fence. Such a fence is not a permanent structure, but could be removed with hardly any trouble or expense. It would serve to keep the owner's animals from escaping and the animals of

¹ Crain v. Fox, 16 Barb. 184.

⁴ Faulkner v. Duff (Ky.), 20 S. W.

² Moore v. Rawson, 3 B. & C. 332. Rep. 227.

³ White's Bank v. Nichols, 64 N.Y. 65.

his neighbors from entering upon his land. "So many motives may be assigned for maintaining the fence temporarily, and the structure was so slight and so easily removed, that it is far from being sufficient of itself to prove an abandonment of the easement."¹

A right of way is not extinguished by the habitual use by its owner of another way in place of it, unless there is an intentional abandonment of the former way.²

One may so conduct himself as to relinquish a part of an easement without relinquishing the whole.³

853. The owner of the dominant estate may make such changes in the use and condition of it as to amount, in fact, to a renunciation of the easement, and this may be relied on by the owner of the servient estate as evidence of abandonment. Chief Justice Shaw gives the following illustrations of this mode of abandonment: "As when one takes down the building in which a window was placed, and erects on the site a permanent tenement, so constructed as not to require, or even permit, a window similarly situated; or when one grants an express license to do acts on his own land, the necessary effect of which is to take away or impair the easement permanently, and the acts are done accordingly."⁴

There is an abandonment of an easement in a wall, not a party-wall, which forms the side of a building, where the owner, after the destruction of the wall and building, erects a new building on a different foundation.⁵

Where adjoining owners had an easement in common, acquired by prescription, of a way between their houses for access to the rear of them and upon their destruction by fire, one of the owners rebuilt his house, the question arose whether he had placed the foundation of it on the old foundation or in the alley, and had thereby forfeited his right to the easement. The evidence being conflicting, an issue at law was ordered to ascertain the fact and until this should be

¹ Hayford v. Spokesfield, 100 Mass. 491, 495, per Chapman, C. J.

² Jamaica Pond Aqueduct Co. v. Chandler, 121 Mass. 3. And see Hayford v. Spokesfield, 100 Mass. 491; Ward v. Ward, 7 Exch. 838; Lovell v. Smith, 3 C. B. N. S. 120; Hale v. Oldroyd, 14 M. & W. 789.

³ Tyler v. Cooper, 47 Hun, 94; Latimer v. Livermore, 72 N. Y. 174.

⁴ Dyer v. Sanford, 9 Met. 395, 402, 43 Am. Dec. 399, citing Liggins v. Inge, 7 Bing. 682, and 5 Moore & Payne, 712; Canny v. Andrews, 123 Mass. 155.

⁵ Duncan v. Rodecker, 90 Wis. 1, 62 N. W. Rep. 533.

done such owner was not enjoined from appropriating part of the alley next to his lot in rebuilding.¹

One having a right of way over an alley, the only access to which was by a gate through a wall from a yard in the rear of his building, built on such yard and closed the gate, by building up the wall solid, and opened a coal hole through the wall of the old building. It was held that, though the making of the coal hole and the use of it may have been a trespass on the land of the owner of the fee, the closing of the gate did not constitute an abandonment of the way by the owner of the easement. Though the use of the coal hole may have made the use of the passage-way in connection with it unlawful, such continuous use of the way for more than twenty years, with the knowledge and against the will of the owner of the fee, was notice to him and all concerned that the claims of the owner of the easement were not abandoned.²

854. The use of an easement for an unauthorized purpose is not an abandonment of it. A railroad company by leasing lands, acquired for railroad purposes, to be used by the lessee as a coal yard in the prosecution of his private business to the exclusion of any public use, does not abandon its easement of way.³ In the case cited the company reserved the right to terminate the lease upon giving six months' notice, and also reserved the use of a track upon the land for all the purposes of a railroad.

Mr. Justice Earl, delivering the judgment of the Court of Appeals, said:⁴ "An easement may be abandoned by unequivocal acts showing a clear intention to abandon, or by mere non-user, if continued for a long time. The mere use of the easement for a purpose not authorized, the excessive use or misuse, or the temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment. Under these authorities the acts claimed to constitute the abandonment of an easement must show the destruction thereof, or that its legitimate use has been rendered impossible by some act of the owner thereof, or some other unequivocal act show-

¹ Chew v. Cook, 39 N. J. Eq. 396.

² Vinton v. Greene, 158 Mass. 426, 33 N. E. Rep. 607.

³ Roby v. N. Y. Cent. & H. R. Co., 142 N. Y. 176, 181, 36 N. E. Rep. 1053, reversing 65 Hun, 532, 20 N. Y. Supp. 551.

⁴ Hoggatt v. Vicksburg S. & P. R.

Co., 34 La. Ann. 624; Curran v. Louisville, 83 Ky. 628; Proprietors of Locks v. N. & L. R. Co., 104 Mass. 1, 6 Am. Rep. 181; White's Bank v. Nichols, 64 N. Y. 65; Crain v. Fox, 16 Barb. 184; Snell v. Levitt, 110 N. Y. 595, 18 N. E. Rep. 370.

ing an intention to permanently abandon and give up the easement. Here there were absolutely no acts of the kind mentioned. The railroad company could put an end to the lease at any time by giving the lessee six months' notice. It continued to use the track passing over the land in question for railroad purposes, to wit, the transportation of coal to the lessee, and it actually reserved the use and control of the track and land for all railroad purposes. I can assert with great confidence, after a diligent examination of the books, that no authority can be found holding that upon such facts an easement has been absolutely lost to the owner thereof."

An abuse of a prescriptive right does not work a forfeiture of the right to use it lawfully.¹

But if the grant of an easement is general without defining the purpose or use of it, it is not limited to the use made of it at the time of the grant. The owner of an upper and lower mill privilege conveyed the upper privilege, reserving, for the benefit of the lower privilege all the water which could be drawn through the waste gate when the water ran over the dam. The lower privilege was then used for a grist-mill but was afterwards used for a large cotton factory, and it was contended that the grantor had no right to use the water for the latter purpose; but it was held that the reservation being general it did not matter for what purpose the water might be used.²

855. If one having an easement of a right of way, erects a permanent obstruction, such as a building in the way, or any part of it, he thereby abandons his easement.³ Thus, if one having an easement in a passage-way occupies a material part of it for his own private use otherwise than for a way, he thereby shows an intention

¹ *Masonic Assoc. v. Harris*, 79 Me. 250, 9 Atl. Rep. 737; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1, 8, 6 Am. Rep. 181.

² *Atlanta Mills v. Mason*, 120 Mass. 244.

³ *Krehl v. Burrell*, 7 Ch. D. 551; *Alan v. Gomme*, 11 Ad. & El. 759; *Kirkpatrick v. Brown*, 59 Ga. 450; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484, 22 Am. L. Reg. N. S. 394. 399 note; *Vogler v. Geiss*, 51 Md. 407; *Hayford v. Spokesfield*, 100 Mass. 491; *Carlin v. Paul*, 11 Mo. 32, 47 Am. Dec. 139;

Smith v. Wiggin, 52 N. H. 112; *Lattimer v. Livermore*, 72 N. Y. 174; *Corning v. Gould*, 16 Wend. 531; *Arnold v. Cornman*, 50 Pa. St. 361; *Ebner v. Stichter*, 19 Pa. St. 19; *Hacke's Appeal*, 101 Pa. St. 245; *Hall v. McCaughey*, 51 Pa. St. 43; *Steere v. Tiffany*, 13 R. I. 568; *Craven v. Rose*, 3 S. C. 72; *Taylor v. Hampton*, 4 McCord, 96, 17 Am. Dec. 710; *Bowen v. Team*, 6 Rich. 298, 60 Am. Dec. 127; *Dodge v. Stacy*, 39 Vt. 558; *Dillman v. Hoffman*, 38 Wis. 559.

to abandon its use as a way.¹ And so, where one having a right of way in common with another builds a part of the wall of his house upon the way and encloses another portion of it with a fence, his right of way is extinguished. These acts are incompatible with the enjoyment of the way as it had been used. The way as between the parties, at least, was an entire thing and the extinguishment of it in part is an extinguishment of the whole.²

If an easement of a right of way is obstructed by the erection of a building thereon by another person, the owner of the easement is not estopped from asserting his rights unless it is shown that the person erecting the building was induced so to do by the conduct or language of such owner;³ or that he stood by and allowed the servient owner or another to erect a building across the way without remonstrance.⁴

856. An abandonment of a right of way or other easement granted for the benefit of the public is more readily presumed than is an abandonment of a like easement held and owned for private use and benefit. Thus, a right of way for a street railroad over a public street granted by legislative act has been held to be lost and abandoned by non-user for more than ten years, and then after such a period of non-user the Legislature might grant the right of way to another corporation. The court said that the rules which apply to the non-user or abandonment of a like easement held for private use and benefit should not be applied with strictness to this kind of a right, which was given for the public use and benefit.⁵

Land was conveyed to a railroad company for a right of way so long as the land should be used for railroad purposes. The way was graded. Afterwards the successor of the original company completed the road by a new route and refused to construct it on land conveyed. The grantor of the land conveyed for the right of way occupied it for five years after the completion of the road by the new route, and put valuable improvements upon it without objection from the railroad company. It was held that the right of

¹ *Steere v. Tiffany*, 13 R. I. 568; N. E. Rep. 896; *Vogler v. Geiss*, 51 King v. Murphy, 140 Mass. 254, 4 N. Md. 407.

E. Rep. 566; *Hennessy v. Murdock*, 17 N. Y. Supp. 276, 63 Hun, 625. ⁴ *Arnold v. Cornman*, 50 Pa. St. 361.

² *Corning v. Gould*, 16 Wend. 531.

⁵ *Henderson v. Central Passenger R. Co.*, 21 Fed. Rep. 358.

³ *Welsh v. Taylor*, 134 N. Y. 450, 31 As to abandonment of public highways, see §§ 529-552.

way was abandoned and reverted to the grantor. The acts of the railroad company showed a clear intention to abandon the right of way.¹

A railroad company purchased a right of way upon the express condition that its road should be completed within three years and performed this condition. Subsequently another railroad company purchased all the rights of way of the first company and having taken up the track of a portion of the road, ceased to use, and wholly abandoned, such portion, and conveyed it to a private individual for private uses. The grantor of the right of way for this portion of the road brought suit to recover it on the ground that it had been abandoned; and the court held that the conveyance by the railroad company of this land for private use was wholly incompatible with the use of the land for railroad purposes and manifested a clear intention of immediate abandonment of that part of the road.²

A right of way for a railroad through land, about midway between stations two or three miles distant, was granted by a deed which provided that if "it should cease to be used and operated as a railroad * * * this release shall cease to be operative, and the right of way granted thereunder shall terminate." The grantee consolidated with a company whose track ran between the stations referred to by a different route, and thereafter the grantee's track was used only for storing cars. It was held that the right of way was forfeited.³

Evidence that a railroad was taken up, the rails and ties removed, the fences taken away, and a bridge across a river torn down, and all with a view of abandonment, is sufficient to show an abandonment of the easement of right of way.⁴

But where a street railway company having the right to lay a double track, operated its road for some years, and then abandoned one track, but relaid it after ten years, it was held that it had not lost the right to use both tracks.⁵

¹ Roanoke Investment Co. v. Kansas City & S. E. R. Co., 108 Mo. 50, 17 S. W. Rep. 1000. See also Reichenbach v. Washington Short Line R. Co., 10 Wash. 357, 38 Pac. Rep. 1126; Louisville & N. R. Co. v. Covington, 2 Bush, 526; Beattie v. Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. Rep. 913; Marigny v. Pontchartrain R. Co., 15 La. Ann. 427.

² Louisville & Nashville R. Co. v. Covington, 2 Bush, 526.

³ Hickox v. Chicago & C. S. R'y Co., 78 Mich. 615, 44 N. W. Rep. 143.

⁴ Jones v. Van Bochove, 103 Mich. 98, 61 N. W. Rep. 342. And see Henderson v. Central P. R. Co., 21 Fed. Rep. 358.

⁵ Hestonville M. & F. Pass. R. Co. v. Philadelphia, 89 Pa. St. 210.

857. A mortgagor cannot before default, by his own act and without the consent of the mortgagee, abandon an easement appurtenant to the estate and expressly included in the mortgage, so as to bind the mortgagee or prevent the easement from passing to the purchaser upon a foreclosure sale, although the security of the mortgage debt may not have been impaired by such abandonment.¹

858. A servitude created upon land already subject to a mortgage is cut off by a subsequent foreclosure of the mortgage. The purchaser under the foreclosure sale acquires the title as it stood at the time of making the mortgage free of all intervening rights.² A church owning land subject to a mortgage, conveyed it, reserving an easement for light and air to the windows of its church adjoining, the purchaser assuming the mortgage. This purchaser conveyed the land through a third person, to his wife, subject to the mortgage but without any liability on her part to pay it. Upon a foreclosure of the mortgage the wife became the purchaser and took the deed. It was held that she took the title unencumbered by the easement.³

If one owning two tenements uses a right of way in favor of one through the other, and makes a mortgage of the latter without reserving any right of way over it, and afterwards conveys or devises the tenements to different persons, and the owner of the mortgaged tenement redeems the mortgage and takes a conveyance from the mortgagee, the right of way is extinguished. It is clear that this would have been the result had the mortgagee taken possession and the mortgagor or those claiming under him had not redeemed. But the mortgagor or those claiming under him not having redeemed cannot claim any equity to have such right of way as against the subsequent purchaser who has redeemed the mortgage. It was contended in such a case in behalf of a claimant of such a right of way, that the mortgage having been paid off, it is not to be regarded as in any way affecting the right of way. But such claimant can have no equity to deprive the owner of the other estate of the title which he obtained through the conveyance from the mortgagee unless he redeems that mortgage or contributes towards the redemption.⁴

¹ Duval v. Becker, 81 Md. 537, 32 Atl. 308.

² Christ Church v. Mack, 93 N. Y. 488, 45 Am. Rep. 260, reversing 25

³ 2 Jones on Mortgages, § 1654; Hun, 418; Scrymser v. Phelps, 33 Leavenworth Lodge v. Byers, 54 Kans. Hun, 474.

323, 38 Pac. Rep. 261.

⁴ Taws v. Knowles [1891], 2 Q. B. 564.

859. An easement acquired by a mortgagor after the making of a mortgage enures to the benefit of the mortgage security in the same manner that improvements in the nature of fixtures so enure. "Until foreclosure, the mortgage is deemed a lien or charge subject to which the estate may be conveyed, improved, and in other respects dealt with as the estate of the mortgagor. This rule preserves the benefit of such rights to the whole estate, and best effectuates the intention of the parties. The owner of the servient tenement under whose grant the right is exercised is estopped to deny the right to any lawful occupant of the dominant estate."¹

860. A partition made by tenants in common by mutual deeds of release operates to extinguish an easement in one part of the common estate in favor of the other. Thus, after such deed of release neither of them can continue to exercise a right to flow the land of the other for use of a mill privilege. The deeds operate as a voluntary abandonment or extinguishment of a mill privilege, and it cannot be revived by a grantee of one of the co-tenants as against the other.²

861. An easement mutual to adjoining owners is extinguished by an adverse permanent exclusion of one by the other, at the election of the party excluded. An easement in a way laid out by adjoining owners as a street, but never used as such, is presumed to have been abandoned by the dominant owner when he has enclosed and obstructed a material part of the width of the way by a fence and has made no use of the remaining part during that time.³ In such case, if one owner has occupied a part of the way with a house, a fence, or other permanent structure, he cannot claim that the other owner shall keep the remaining part of the way open and unobstructed. The way as between the parties is an entire thing, and if divided or extinguished in part by the act of one party it is extinguished in whole.⁴ Either party relying for himself on a mutual easement is bound to concede the same easement to the other.⁵

The mere erection and continuance of a gate across a way by one tenant in common, is no evidence of abandonment of an easement therein, by a co-tenant, in the absence of evidence that the gate was

¹ Hankey v. Clark, 110 Mass. 262, 266, per Colt, C. J.

² Hamilton v. Farrar, 128 Mass. 492.

³ Monaghan v. Memphis Fair Co., 95 Tenn. 108, 31 S. W. Rep. 497.

⁴ Corning v. Gould, 16 Wend. 531, 544.

⁵ Dillman v. Hoffman, 38 Wis. 559.

used to exclude him; nor is it evidence of any adverse claim on the part of the one erecting it, and acquiescence in the existence of the gate is not prejudicial to the rights of the co-tenant, unless an adverse claim is brought to his knowledge.¹ The erection of a fence in the center of a private lane by adjoining owners, each enclosing his share of the lane, is an abandonment of the easement by both.²

In case there are mutual easements and one party permanently excludes the other, the party excluded may at his option regard such exclusion as an extinguishment of the mutual easement.³

862. A right of way which has been abandoned by the owner cannot be revived by a subsequent owner.⁴ Thus, where a private lane between two lots was abandoned by the owners and a line fence built in the center of the lane, a subsequent purchaser from one of them cannot revive the use of such easement. The building of the fence was conclusive evidence of an intention to abandon the right of way.⁵

IV. *By Non-User and Adverse Possession.*

863. Mere non-user of an easement created by deed, however long continued, does not create an abandonment. This occurs only where in connection with non-user there is a denial of title, or some act by an adverse party, or attendant facts and circumstances showing an intention on the part of the owner of the easement to abandon it.⁶ "It is not the duration of the cesser to use the easement, but

¹ *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. Rep. 896.

² *Hennessy v. Murdock*, 43 N. Y. St. Rep. 748, 17 N. Y. Supp. 276, 63 Hun, 625.

³ *Dillman v. Hoffman*, 38 Wis. 559.

⁴ *Snell v. Levitt*, 110 N. Y. 595, 18 N. E. Rep. 370; *Crain v. Fox*, 16 Barb. 184; *Corning v. Gould*, 16 Wend. 531.

⁵ *Hennessy v. Murdock*, 17 N. Y. Supp. 276, 63 Hun, 625.

⁶ *Crossley v. Lightowler*, L. R. 3 Eq. 279, L. R. 2 Ch. 478; *Carr v. Foster*, 3 Q. B. 581; *Ward v. Ward*, 7 Exch. 838; *Cook v. Mayor*, L. R. 6 Eq. 177.

California: *Smith v. Worn*, 93 Cal. 206, 28 Pac. Rep. 944; *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554.

Colorado: *Beaver Brook Reservoir Co. v. St. Vrain R. Co.*, 6 Colo. App. 130, 40 Pac. Rep. 1066.

Georgia: *Ford v. Harris*, 95 Ga. 97, 22 S. E. Rep. 144.

Illinois: *Kuecken v. Voltz*, 110 Ill. 264; *Illinois Cent. R. Co. v. Houghton*, 126 Ill. 233, 18 N. E. Rep. 301, 1 L. R. A. 213.

Kansas: *Edgerton v. McMullan*, 55 Kans. 90, 39 Pac. Rep. 1021.

Kentucky: *Curran v. Louisville*, 83 Ky. 628.

Maine: *Pratt v. Sweetser*, 68 Me. 344; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

Maryland: *Vogler v. Geiss*, 51 Md. 407; *Glenn v. Davis*, 35 Md. 208, 217, 6 Am. Rep. 389.

Massachusetts: *Eddy v. Chace*, 140

the nature of the act done by the owner of the easement, or of the adverse act acquiesced in by him, and the intention which the one or the other indicates, that is material. And a cesser of use for a less period than twenty years, accompanied by acts clearly indicating the intent to abandon the right, is sufficient.”¹ If one having by grant a right to dig ore on the land of another neglects to use the

Mass. 471, 5 N. E. Rep. 306; *King v. Murphy*, 140 Mass. 254, 4 N. E. Rep. 566; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. Rep. 1128; *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544, 549; *Barnes v. Lloyd*, 112 Mass. 224; *Bronson v. Coffin*, 108 Mass. 175; *Owen v. Field*, 102 Mass. 90, 114; *Hurd v. Curtis*, 7 Met. 94; *Arnold v. Stevens*, 24 Pick. 106, 35 Am. Dec. 305; *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45; *White v. Crawford*, 10 Mass. 183; *Canny v. Andrews*, 123 Mass. 155; *Jennison v. Walker*, 11 Gray, 423; *Bannon v. Angier*, 2 Allen, 128; *Hayford v. Spokesfield*, 100 Mass. 491.

Michigan: *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. Rep. 791; *Day v. Walden*, 46 Mich. 575, 10 N. W. Rep. 26; *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. Rep. 342.

Minnesota: *Wilder v. St. Paul*, 12 Minn. 192.

Missouri: *Roanoke Investment Co. v. Kansas City & S. E. R. Co.*, 108 Mo. 50, 17 S. W. Rep. 1000.

New Jersey: *Horner v. Stillwell*, 35 N. J. L. 307; *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142; *Dill v. Camden Board of Education*, 47 N. J. Eq. 421, 20 Atl. Rep. 739, 10 L. R. A. 276; *White v. Tidewater Oil Co.*, 50 N. J. Eq. 1, 33 Atl. Rep. 47; *Manning v. Port Reading R. Co.*, 54 N. J. Eq. 46, 33 Atl. Rep. 802; *Riehle v. Heulings*, 38 N. J. Eq. 20.

New York: *Welsh v. Taylor*, 134 N. Y. 450, 33 N. E. Rep. 896, 2 N. Y. Supp. 815; *Hennessy v. Murdock*, 137

N. Y. 317, 31 N. E. Rep. 896; *White v. Manhattan R. Co.*, 139 N. Y. 19; *Snell v. Levitt*, 110 N. Y. 595, 39 Hun, 227, 18 N. E. Rep. 370; *Casler v. Shipman*, 35 N. Y. 533, 542; *Smyles v. Hastings*, 22 N. Y. 217, 224, 24 Barb. 44; *Jewett v. Jewett*, 16 Barb. 150, 157; *Tyler v. Cooper*, 47 Hun, 94, 16 N. Y. St. Rep. 545; *Crain v. Fox*, 16 Barb. 184; *Townsend v. McDonald*, 12 N. Y. 381; *Wiggins v. McCleary*, 49 N. Y. 346; *White's Bank v. Nichols*, 64 N. Y. 65; *Corning v. Gould*, 16 Wend. 531; *Parker v. Foote*, 19 Wend. 309; *Pope v. O'Hara*, 48 N. Y. 446, 452; *Curtis v. Keesler*, 14 Barb. 511; *Valentine v. Schreiber*, 3 App. Div. 235, 73 N. Y. St. 838, 38 N. Y. Supp. 417; *Doe v. Butler*, 3 Wend. 149.

North Carolina: *Beattie v. Carolina Cent. R. Co.*, 108 N. C. 425, 12 S. E. Rep. 913.

Pennsylvania: *Twibill v. Lombard & S. P. R. Co.*, 3 Supr. Ct. 487, 40 W. N. C. 134; *Nitzell v. Paschall*, 3 Rawle, 76; *Butz v. Ihrie*, 1 Rawle, 218; *Erb v. Brown*, 69 Pa. St. 216; *Lindeman v. Lindsey*, 69 Pa. St. 93; *Hall v. McCaughey*, 51 Pa. St. 43; *Bombaugh v. Miller*, 82 Pa. St. 203.

Rhode Island: *Steere v. Tiffany*, 13 R. I. 568.

South Carolina: *Parkins v. Dunham*, 3 Strobb. 224; *Solson v. Ingram*, 22 S. C. 541; *Elliott v. Rhett*, 5 Rich. 405, 57 Am. Dec. 750; *Taylor v. Hampton*, 4 McCord, 96, 17 Am. Dec. 710.

Vermont: *Mason v. Horton*, 67 Vt. 266.
¹ *Pope v. Devereux*, 5 Gray, 409, 412, per Thomas, J.

right for forty years, without any adverse enjoyment on the part of the owner of the land, his right is not extinguished.¹

864. A distinction is made in some cases as regards the effect of non-user between easements created by grant and those created by prescription, that while the former cannot be extinguished by non-user alone, the latter may be.² This distinction is also adopted in the statutes of some States.³ But this distinction is not regarded in many cases, and in some it is declared not to be sound.⁴ Chancellor Zabriskie, of New Jersey, said in one case: "I do not find any decision founded on this distinction, and it would seem to be unfounded, as prescription is based upon the presumption of a grant."⁵

865. In order to extinguish an easement by grant, there must be some conduct on the part of the owner of the servient estate adverse to, and in defiance of, the easement, and the non-use must be the result of it, and must continue for the statutory period of limitation; or, to produce this effect, the non-use must originate in, or be accompanied by, some unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it; and the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right so that it would work harm to him if the easement should be thereafter obstructed.⁶ Nothing short of an adverse and hostile use of the servient estate, inconsistent with the rights of the owner of the easement, will start the statute of limitations running to defeat his right; and nothing short of a continuous adverse use

¹ Arnold v. Stevens, 24 Pick. 106, 35 Am. Dec. 305.

² Angell on Watercourses, § 252; Smyles v. Hastings, 22 N. Y. 217, 224; Jewett v. Jewett, 16 Barb. 150, 157; Nitzell v. Paschall, 3 Rawle, 76, 82, per Gibson, C. J. In many cases the courts doubtless having this distinction in mind take care to say that an easement by grant is not lost by mere non-user, as in Barnes v. Lloyd, 112 Mass. 224, 231; Day v. Walden, 46 Mich. 575, 583.

³ § 834.

⁴ 3 Kent's Com. 449, note by Holmes.

⁵ Veghte v. Raritan Water Power Co., 19 N. J. Eq. 142, 156. And see Curran

v. Louisville, 83 Ky. 628, 632; Jones v. Van Bochove, 103 Mich. 98, 101, 61 N. W. Rep. 342; Roanoke Inv. Co. v. Kansas City & S. E. R. Co., 108 Mo. 50, 62, 17 S. W. Rep. 1000.

⁶ Mason v. Horton, 67 Vt. 266, 31 Atl. Rep. 291, per Start, J. In this case a water privilege owned by defendant and his grantors was not used by them from 1851 to 1877, and the water consequently flowed on the opposite side of the stream, where it was used by plaintiff and her grantors, but to no greater extent than while defendant's privilege was being used, and in 1876 plaintiff ceased to use it. It was held that plaintiff's use was not adverse.

for the period of the statute will establish a right by prescription in the adverse claimant.¹

A right of way made appurtenant to a grant by a description bounding the land upon a way or street is not lost by non-user, except by adverse title or loss of title in some way recognized by law. "A person who acquires title by a deed to an easement appurtenant to land, has the same right of property therein as he has in the land, and it is no more necessary that he should make use of it to maintain his title than it is that he should actually occupy or cultivate the land."²

Whether an easement has been defeated and divested by the adverse use of another is to be determined by the character of the adverse use and the length of its continuance.³

866. Non-user by the owner of the right and adverse user of it by another for a time equal to the period fixed as the limitation of actions for the recovery of real property operate to work a forfeiture of the right, if the adverse user was inconsistent with the exercise of the right.⁴

An easement of a right of way over a strip of land created by grant is not shown to have been abandoned by proof of non-user by the owner of the right, coupled with user of the land for farm purposes by the servient owner when the easement was not wanted.⁵

867. A presumption that an easement has been extinguished arises from a possession by the owner of the servient tenement adverse to the existence of the easement, continued for a period suffi-

¹ Smyles v. Hastings, 22 N. Y. 217, 24 Barb. 44; Day v. Walden, 46 Mich. 575, 10 N. W. Rep. 26, per Cooley J.; Edgerton v. McMullan, 55 Kans. 90, 39 Pac. Rep. 1021; Owen v. Field, 102 Mass. 90, 114; Veghte v. Raritan W. P. Co., 19 N. J. Eq. 142; Horner v. Stillwell, 35 N. J. Eq. 307, 314; Curran v. Louisville, 83 Ky. 628.

² Welsh v. Taylor, 134 N. Y. 450, 460, 31 N. E. Rep. 896, 18 L. R. A. 535, per Brown, J.

³ Polson v. Ingram, 22 S. C. 541.

⁴ Wimer v. Simmons, 27 Oreg. 1, 39 Pac. Rep. 6, per Wolverton, J.; Dodge v. Marden, 7 Oreg. 456; Yankee Jim's Union Water Co. v. Crary, 25 Cal. 504, 508; Smith v. Langewald, 140 Mass.

205, 207, 4 N. E. Rep. 571; Chandler v. Jamaica Pond Aqueduct Co., 125 Mass. 544; Barnes v. Lloyd, 112 Mass. 224; Owen v. Field, 102 Mass. 90; Jen-nison v. Walker, 11 Gray, 423; Bann-on v. Angier, 2 Allen, 128; Hoffman v. Savage, 15 Mass. 130; Dill v. Camden Board of Education, 47 N. J. Eq. 421, 20 Atl. Rep. 739, 10 L. R. A. 276; State v. Suttle, 115 N. C. 784, 20 S. E. Rep. 725; Bowen v. Team, 6 Rich. 296, 60 Am. Dec. 127; Galveston v. Williams, 69 Tex. 449, 6 S. W. Rep. 860; Galves-ton v. Luffkin, 23 Tex. 349; Woodruff v. Paddock, 130 N. Y. 618, 29 N. E. Rep. 1021; Townsend v. McDonald, 12 N. Y. 381.

⁵ James v. Stevenson [1893], A. C. 162.

cient to give title by prescription under the statute of limitations.¹ There is in such case a presumption that the right has been extinguished. An easement may be acquired by prescription or lost by adverse user, but in either case the user must be of such a nature as to expose the claimant under it to an action at any time during the period necessary to give title by adverse possession.²

Mere non-user of an easement for the prescriptive period without any adverse user by the owner of the servient estate affords a presumption, not very strong, if it affords any presumption at all, of abandonment. It is said in some cases that mere non-user of the easement for a period less than that required to give a prescriptive right does not alone afford sufficient evidence of an abandonment of the easement.³

868. Where the easement is a right to raise a dam and flow the land of another, the uninterrupted and adverse occupation of the land by the owner, for more than twenty years, under a claim of title in fee, extinguishes the easement. Such use and occupation of the land gives the owner a title by prescription free of the easement.⁴

But the mere cultivation of the servient land over which another has the right to flow water by a dam is not an interference with the enjoyment or right to use the easement of flowage, and does not constitute an adverse possession by the servient owner.⁵

A right of mining is not lost by the cultivation of the soil by the servient owner, but only by his engaging in mining the

¹ *Drewett v. Sheard*, 7 C. & P. 465; *Wright v. Freeman*, 5 Harr. & J. 467; *Jennison v. Walker*, 11 Gray, 423, 425; *Arnold v. Stevens*, 24 Pick. 106, 35 Am. Dec. 305; *Hoffman v. Savage*, 15 Mass. 130; *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544; *Horner v. Stillwell*, 35 N. J. L. 307; *Shields v. Arndt*, 4 N. J. Eq. 234; *Smyles v. Hastings*, 22 N. Y. 217; *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. Rep. 896, 2 N. Y. Supp. 815, 50 Hun, 137; *Yeakle v. Nace*, 2 Whart. 123; *Butz v. Ihrie*, 1 Rawle, 218; *Polson v. Ingram*, 22 S. C. 541, 547.

² *State v. Suttle*, 115 N. C. 784, 20 S. E. Rep. 725; *Emery v. Raleigh & G.*

R. Co., 102 N. C. 209, 9 N. E. Rep. 139; *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. Rep. 804; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76; *Sullivan v. Zeiner*, 98 Cal. 346; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299.

³ *Williams v. Nelson*, 23 Pick. 141.

⁴ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

⁵ *State v. Suttle*, 115 N. C. 784, 20 S. E. Rep. 725, citing *Boomer v. Gibbs*, 114 N. C. 76; *Hamilton v. Icard*, 114 N. C. 532; *Osborne v. Johnston*, 65 N. C. 22. And see *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. Rep. 1128; *Arnold v. Stevens*, 24 Pick. 106.

minerals, or by his interference with the enjoyment of the right by the dominant owner.¹

869. The non user of an easement may, however, be given in evidence as showing an intention to abandon it. But to make an abandonment it must clearly appear from the evidence that there was a leaving of the claim without any intention of returning, or making any further use of it.² The evidence is open to explanation, and is controlled by proof that the owner of the easement had no intention of abandoning it while omitting to use it.³ "It is not easy to define what acts of the owner of an easement could operate to extinguish the same; but in all cases the act must be judged by the intention indicated by it, and nothing short of an intention to abandon the right will operate to extinguish it, unless other persons have been led by such acts to treat the servient estate as if free of the servitude."⁴

Upon the question of abandonment of an easement of way the testimony of a former owner of the dominant tenement that more than twenty years previously he orally relinquished to the owner of the servient tenement his right to the way, and ceased to use it, is admissible.⁵

Where one conveyed land with a right to the grantee to lay pump logs to conduct water from a spring unto other land of the grantor, and subsequently the grantee, for a consideration paid in money and the right to draw water from pump logs running to the grantor's

¹ Arnold v. Stevens, 24 Pick. 106, 35 Am. Dec. 305.

² Moore v. Rawson, 3 B. & C. 332; Moon v. Rollins, 36 Cal. 333, 95 Am. Dec. 181; Bell v. Bed Rock T. & M. Co., 36 Cal. 214; Smith v. Cushing, 41 Cal. 97; Judson v. Malloy, 40 Cal. 299; Strang v. Ryan, 46 Cal. 33; Beaver Brook Reservoir Co. v. St. Vrain Reservoir Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Pratt v. Sweetser, 68 Me. 344; Farrar v. Cooper, 34 Me. 394; Pope v. Devereux, 5 Gray, 409; Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399; Jamaica Pond Aqueduct v. Chandler, 121 Mass. 3; Eddy v. Chace, 140 Mass. 471; 5 N. E. Rep. 306; Butterfield v. Reed, 160 Mass. 361; Raritan W. P. Co. v.

Veghte, 21 N. J. Eq. 463; Horner v. Stillwell, 35 N. J. L. 307; Roby v. New York Cent. R. Co., 142 N. Y. 176; Wiggins v. McCleary, 49 N. Y. 346; Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. Rep. 330, 50 N. Y. St. Rep. 717; Snell v. Levitt, 110 N. Y. 595, 18 N. E. Rep. 370; Vogler v. Geiss, 51 Md. 407; Glenn v. Davis, 35 Md. 208, 6 Am. Rep. 389; Curran v. Louisville, 83 Ky. 628.

³ Pratt v. Sweetser, 68 Me. 344.

⁴ White's Bank v. Nichols, 64 N. Y. 65, 74, per Allen, J. And see Tyler v. Cooper, 47 Hun, 94; Snell v. Levitt, 110 N. Y. 595; White v. Metropolitan R. Co., 139 N. Y. 19, 34 N. E. Rep. 887, 54 N. Y. St. Rep. 409.

⁵ Warshauer v. Randall, 109 Mass. 586.

house from another spring, gave up the use of the original right, and this agreement was acted upon for more than twenty years, during which time the servient estate was conveyed to another, who had no notice that any right was claimed under the easement to draw water as originally created, it was held, that the easement was abandoned and extinguished. There was a non-user of an easement for upwards of twenty years, and during a large portion of that time a substituted easement was used. Under these circumstances the abandonment was not even a question of fact for the jury; but it was the duty of the court, as a matter of law, to rule that the easement was extinguished.¹

§ 870. When there is an intention to abandon an easement and at the same time a cesser of its use, the abandonment is complete.²

Lord Denman, delivering judgment in a case before the Queen's Bench, said:³ "We apprehend that as an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time.

* * * It is not so much the duration of the cesser, as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury."

A cesser of the use of an easement, accompanied by any act clearly indicating an intention to abandon the right, has the same effect as

¹ Snell v. Levitt, 110 N. Y. 595, 18 N. E. Rep. 370.

² Moore v. Rawson, 3 B. & C. 332; Liggins v. Inge, 7 Bing. 682; Hale v. Oldroyd, 14 M. & W. 789; Ward v. Ward, 7 Exch. 838; Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399; Jennison v. Walker, 11 Gray, 423; Curtis v. Noonan, 10 Allen, 406; Bannon v. Angier, 2 Allen, 128; Morse v. Copeland, 2 Gray, 302; Canny v. Andrews, 123 Mass. 155, 157; King v. Murphy, 140 Mass. 254, 4 N. E. Rep. 566; Hayford v. Spokesfield, 100 Mass. 491; Pope v. Devereux, 5 Gray, 409, 412, per Thomas, J.; Williams v. Nelson, 23 Pick. 141; Glenn v. Davis, 35 Md. 208, 6 Am. Rep. 389; Vogel v. Geiss,

51 Md. 407; Jones v. Van Bochove, 103 Mich. 98, 61 N. W. Rep. 342; Suydam v. Dunton, 84 Hun, 506, 32 N. Y. Supp. 333; Snell v. Levitt, 110 N. Y. 595, 18 N. E. Rep. 370, 1 L. R. A. 414; Welsh v. Taylor, 134 N. Y. 450, 31 N. E. Rep. 896; White v. Manhattan R. Co., 139 N. Y. 19; Smyles v. Hastings, 22 N. Y. 217; Crain v. Fox, 16 Barb. 184; Cartwright v. Maplesden, 53 N. Y. 622; White's Bank v. Nichols, 64 N. Y. 65; Valentine v. Schreiber, 3 App. Div. 235, 73 N. Y. St. Rep. 838, 38 N. Y. Supp. 417; Wiggins v. McCleary, 49 N. Y. 346; Mowry v. Sheldon, 2 R. I. 369; Steere v. Tiffany, 13 R. I. 568; Rhodes v. Whitehead, 27 Tex. 304.

³ Queen v. Chorley, 12 Q. B. 515, 518.

a release without reference to time. "There can be no abandonment without some action of the will and an intent to abandon, but such intent may be inferred from the acts and declarations of the party against whom the relinquishment is claimed. Time is not, however, an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete."¹

871. But the duration of the cesser of use of an easement may afford some indication of the intention of the owner of the easement to abandon it. Thus, where dye works had not been used for more than twenty years, and had been allowed to go to ruin, it was held that a right of fouling the stream attached to them had been lost.² Lord Chelmsford, L. C., delivering the judgment in the case cited, said: "The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to show that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind."

¹ *Wimer v. Simmons*, 27 Oreg. 1, 12, 1 Nev. 188, 90 Am. Dec. 484; *Dodge v.* 39 Pac. Rep. 6, 9, per Wolverton, J.; *Marden*, 7 Oreg. 456.

Mallett v. Uncle Sam G. & S. M. Co., ² *Crossley v. Lightowler*, L. R. 2 Ch. 478, 482.

CHAPTER XIX.

REMEDIES AT LAW. 872-877.

872. Introductory. It is proposed to treat of remedies, whether at law or in equity, only very briefly. It is not necessary to consider general rules of pleading or practice relating to either of these forms of remedy. The systems of procedure differ much in the several States, and while every lawyer is presumed to know the general principles and modes of procedure in his own State, he is not generally interested in those of other States. It is, therefore, not desirable to encumber these pages with statements in regard to remedies except as they relate to matters peculiar to the subject of easements, and are of general application. Moreover, much has been said in previous chapters about remedies in treating of the several kinds of specific easements.

873. Any one in possession of the premises to which the easement belongs may have an action for a disturbance of his enjoyment. A tenant at will under a parol lease may maintain a suit for damages for the obstruction of a passage-way which he is entitled to use. His possession of the premises and of the passage-way is sufficient to enable him to maintain a suit against one who has disturbed his possession.¹ If the estate of a reversioner of the dominant tenement, not in possession, is not affected by an obstruction of an easement appurtenant to it, and no right can be acquired against him by user, he has no right of action.² If his reversionary estate is injured in any way, as where the injury is of a permanent character, he may sue for the injury to the inheritance, and the person in possession may also sue for the disturbance of his possession.³

¹ *Hamilton v. Dennison*, 56 Conn. 359, 15 Atl. Rep. 748; *Hastings v. Livermore*, 7 Gray, 194; *Foley v. Wyeth*, 2 Allen, 131, 135, 79 Am. Dec. 771; *Noyes v. Hemphill*, 58 N. H. 536, 537. per *Smith, J.*; *Baxter v. Taylor*, 4 B. & Ad. 72.

² *Cooper v. Crabtree*, 19 Ch. D. 193.

³ *Bell v. Midland R. Co.*, 10 C. B. N. S. 287; *Metropolitan Association v. Petch*, 5 C. B. N. S. 504; *Kidgill v. Moor*, 9 C. B. 364; *Goddard on Easements* (5th ed.), 429; *Hastings v. Livermore*, 7 Gray, 194; *Richardson v.*

Where a railroad company held lands under a deed which stipulated that the company should maintain an opening to a hotel adjacent to its road, an easement was thereby created in favor of the owner of the hotel property appurtenant to the property, and a lessee of the property may sue for damages for an obstruction of such opening. The lease vested the lessee with the right to enjoy the hotel property, and the whole of it, with the uninterrupted use of this easement, and he is entitled to protect this by any legal remedy for the removal of the obstruction, or to seek redress in damages for the wrongful act. The lessee may also maintain an action for damages on the ground that the obstruction of the easement is a continuing nuisance, for which, as one of the remedies, the person damaged may bring successive suits to recover his damages.¹

It seems that a release, by a tenant to the owner of the fee, of all interest in the street in front of the demised premises, and in any easements appurtenant thereto which were granted by the lease, is a valid conveyance, so far as to transfer any right to compensation for an attempt to interfere with such interest and easements by a third party. Such an instrument is not a severance of the easements from the land, but reinvests them in the owner to the extent of enabling him fully to protect any encroachment upon the reversion.²

The title to an easement appurtenant to land may be quieted under a statute in Massachusetts by a petition compelling the respondent to bring an action against him to try the same. The statute provides that the person who is in the enjoyment of an easement shall be held to be in possession of real property for the purposes of this provision.³ In order to maintain a petition under this provision, the petitioner must have the possession or enjoyment of the easement and not a mere title to it.⁴

874. In a suit for damages for interfering with an easement, the plaintiff's title to the easement should in the first place be set forth. Thus, in a suit for obstructing a drain, which discharged water upon the defendant's land, the declaration set out no ground for the exercise of the right he claimed, either by grant or prescription, and did not show why the defendant was not entitled to the free and unobstructed enjoyment of his land, and it was held that no

Bigelow, 15 Gray, 154; Brown v. Macy v. Metropolitan Elev. Ry. Co., 59 Hun, 365.

¹ Avery v. New York Cent. & H. R. Co., 106 N. Y. 142, 12 N. E. Rep. 619.

³ P. S. 1882, ch. 176.

⁴ Bowditch v. Gardner, 113 Mass. 315.

cause of action was set forth. Where no right is shown, there can be no remedy for an infringement of it.¹

A violation or obstruction of the easement should be alleged. In an action for withdrawing lateral support to land the material allegation is that the defendant made an excavation so near the plaintiff's land as to cause it to fall into the excavation, to the plaintiff's damage. Where it was not alleged that the defendant, a railroad company, made the excavation, but merely that it ran its trains and conducted its business on its railroad where such an excavation had been made without a retaining wall to protect the plaintiff's lot, it was held that no cause of action had been stated.²

875. To maintain an action at law for disturbing or obstructing an easement, as distinguished from a natural right, it is not necessary to prove actual damages if the disturbance is continuous or permanent. Damages are presumed to have resulted from the violation of the right. The disturbance of the easement is in derogation of the title of the dominant owner; and though he has suffered no actual injury, he may maintain an action to vindicate his title and have a judgment for nominal damages.³ "Actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him."⁴

Thus, if a right of way is obstructed, though the owner of the right has not personally sustained any actual injury, and has had no occasion to use the way, he may maintain an action for the obstruction, because, if the obstruction were allowed to remain, it might, in course of time, furnish evidence of an adverse user in derogation of the easement, or evidence of an abandonment of the easement.⁵

¹ *Martin v. Gainsville, J. & S. R. Co.*, 78 Ga. 307. Atl. Rep. 425; *Vermont Cent. R. Co. v. Hills*, 23 Vt. 681; *Fullam v. Stearns*,

² *Secongost v. Missouri Pac. R. Co.*, 53 Mo. App. 369. 30 Vt. 443; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; *Creighton v. Evans*, 53

³ *Harrop v. Hirst*, L. R. 4 Ex. 43; *Blodgett v. Stone*, 60 N. H. 167; *Amos-keag Manuf. Co. v. Goodale*, 46 N. H. 53; *Tillotson v. Smith*, 32 N. H. 90; *Collins v. St. Peters*, 65 Vt. 618, 27

Cal. 55. See § 754. ⁴ *Webb v. Portland Manuf. Co.*, 3 Sumn. 189, 192, per Story, J.

⁵ *Bower v. Hill*, 1 Bing. N. C. 549; *Williams v. Morland*, 2 B. & C. 910.

876. There is no cause of action for the disturbance of a natural right until damage has occurred, unless the right itself is injured or questioned. Thus an action for the disturbance of the natural easement of lateral or subjacent support does not arise until damage is actually sustained. The statute of limitations does not begin to run against such an action until damage is suffered. It does not begin to run from the time of the excavation when the damage did not follow immediately, but at a subsequent period. An excavation on one's own property is not a trespass upon the property of another lying adjacent thereto or above it, and no damage could be presumed from the excavation on the ground of trespass.¹

877. An action lies for the diversion of the water of a stream, at the suit of a riparian proprietor, though he has suffered no actual injury, and in fact makes no use of the water, for the diversion or obstruction of the water is an injury to his right. The act of diversion or obstruction would in time establish, if unopposed, an adverse easement and impair or destroy his right.² "The injury done the complainant in such a case is an invasion of his general right to have the water-course flow in its natural channel through his lands, operating to interrupt a possible water power, or to suspend an agency capable of imparting fertility to the soil through which it passes, or other damage of a general character. In all such cases, however, the plaintiff can recover nothing more than nominal damages, unless he shows affirmatively that he has suffered some special damage."³

Where an upper proprietor diverted and detained the water of a natural stream for the purposes of irrigation, it was held that the detention and use of the water shown were necessarily injurious to the riparian proprietor below, and that it was not necessary to show any actual damage to him. Cresswell, J., delivering the judgment

¹ Backhouse v. Bonomi, 9 H. L. Cas. 503, El. B. & El. 646; and see Kensit v. Great East. R. Co., 23 Ch. D. 566. Previously to the above decision it had been held that the cause of action arose immediately upon the removal of the support. Nicklin v. Williams, 10 Exch. 259.

² Sampson v. Hoddinott, 1 C. B. N. S. 590, 611; Crossley v. Lightowler, L. R. 3 Eq. 279, 296, L. R. 2 Ch. 478; Ul-

bright v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572; Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394, 24 Ala. 130, 60 Am. Dec. 453; Burden v. Stein, 27 Ala. 104; Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739. See § 754.

³ Ulbright v. Eufaula Water Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 574, per Somerville, J.

of the Court of Common Pleas, said: "It appears to us that all persons having lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not; and that they may begin to exercise them whenever they will. By usage they may acquire a right to use the water in a manner not justified by their natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. If the user of the stream by the plaintiff for irrigation was merely an exercise of his natural right, such user, however long continued, would not render the defendant's tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water. If the user by the plaintiff was larger than his natural rights would justify still there is no evidence of its affecting the defendant's tenement, or the natural use of the water by the defendant, so as to render it a servient tenement. But if the user by the defendant has been beyond his natural right, it matters not how much the plaintiff has used the water, or whether he has used it at all. In either case, his right has been equally invaded and the action is maintainable" ¹

¹ *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 611, per Cresswell, J.

CHAPTER XX.

REMEDIES IN EQUITY.

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| I. Injunctions to prevent injuries,
878-888. | II. Injunctions for the removal of
obstructions, 889-890. |
| | III. Abatement of obstructions, 891. |

I. *Injunctions to Prevent Injuries.*

878. An injunction is generally a preventive or protective remedy, applicable in case the injury is not already complete.¹ But it may be exercised as a restorative remedy, by compelling a defendant who has wrongfully and wilfully obstructed the plaintiff in the exercise of a right, as by building a wall or other structure in a passage-way in which the plaintiff has an easement, to remove the obstruction and restore the passage-way to its former condition.²

It is the nature of the injury, rather than the magnitude of it, that forms the basis of the equitable remedy of a protective injunction. If the injury threatened would impair the plaintiff's just enjoyment of his property he is ordinarily entitled to an injunction to prevent the injury, though it is possible that compensation could be made in damages. The fact that compensation can be so made is an important consideration, but it is not decisive. Jurisdiction in equity depends generally upon the inadequacy of the remedy at law to compensate for the particular injury, and not upon the entire want of such a remedy. The court may determine whether, in view of the nature of the injury complained of, and all the circumstances of the case, the legal remedy is adequate, or whether the court shall intervene with an equitable remedy for the purposes of complete justice.³ Thus, in England, where the law of ancient lights prevails, courts of equity have often interfered by injunction

¹ Lexington City Nat. Bank v. 107 Pa. St. 14; Dana v. Valentine, 5 Guynn, 6 Bush, 486; Smith v. Adams, Met. 8; New York v. Mapes, 6 Johns. Ch. 46; Davis v. Londgreen, 8 Neb. 43; Jersey City v. Gardner, 33 N. J. Eq. 622.

² §§ 889, 890.

³ Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579; Bierbower's App.

to prevent the building of structures which will darken windows which are entitled to protection as ancient lights, for the injury to the comfort and use of the house having such windows is material, and the remedy at law could be had only by successive actions, and the damages so recovered would afford no adequate remedy.¹

879. The injury threatened need not be irreparable by damages in an action at law, in order to secure relief in equity to prevent interference with easements.² It is sufficient ground for such relief that the injury cannot be adequately compensated in damages in a suit at law;³ or that the injury is a continuing one, and compensation for it at law could be had only by successive suits, when relief in equity will be granted to prevent a multiplicity of suits and vexatious litigation.⁴ In the latter case the ground of interference is really that the law affords no adequate remedy, for the remedy which it affords is only an action for past damages, to be repeated so often as the cause of action is repeated.⁵ Thus, relief will be interposed by injunction to prevent the diversion and to compel the restoration of running water to its natural channel when wrongfully diverted. The grounds of interposition in such case are twofold. First, the inadequacy of any legal remedy to secure the party in the enjoyment of his right to have the water flow in its natural channel. Second, to prevent a multiplicity of suits for damages accruing from the daily and continuous wrongful diversion of the stream. "The plaintiffs are entitled to the flow of the stream in its natural channel. Legal remedies cannot restore it to them and secure them in the enjoyment of it. Hence the duty of a court of equity to interpose for the accomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid, the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there

¹ Story's Eq. Juris., § 926; Sutton v. 37 N. H. 254; Webber v. Gage, 39 N. Montford, 4 Sim. 559; Heath v. Bucknall, L. R. 8 Eq. 1, 6, per Lord Romilly, H. 182.

² Swan v. Burlington, Cedar Rapids & N. Ry. Co., 72 Iowa, 650, 34 N. W. Rep. 457. ⁴ Coe v. Winnepisiogee Manuf. Co., 37 N. H. 254; Webber v. Gage, 39 N. H. 182.

³ Coe v. Winnepisiogee Manuf. Co., ⁵ Coe v. Winnepisiogee Manuf. Co., 37 N. H. 254.

is a great defect in jurisprudence. But there is no such defect. The right of the plaintiffs to the equitable relief sought is established by authority as well as principle.”¹

880. A continuing interference with an easement may be perpetually enjoined in equity although an action at law might have been maintained for damages; as, for instance, where there is an obstruction of a private right of way. A suit at law is an inadequate remedy because damages could be recovered only to the time of the bringing of the action, and a multiplicity of suits would be necessary in case the obstruction is continued.² “When the legal right of the party complaining is clear and undoubted, and the wrong is not susceptible of adequate compensation in damages recoverable in an action at law, or is in its very nature and character continuous and constantly recurring, the interference of the court is necessary to prevent irreparable injury and a multiplicity of suits. There is, in the contemplation of the court, a very just distinction between injuries in their nature temporary and fugitive, and injuries permanent, continuous, constantly recurring. In reference to temporary injuries, the intervention of the court may depend upon the adequacy of legal remedies. But when the injury is permanent, continuous, constantly recurring, there may be a remedy at law, but its inadequacy is obvious. The court of law cannot restore the party complaining to the condition in which he was before the wrong was done, and in which he has the legal right to remain

¹ *Corning v. Troy I. & N. Factory*, 40 N. Y. 191, 206, per Grover, J., citing *Webb v. Portland Manuf. Co.*, 3 Sumner, 189; *Tyler v. Wilkinson*, 4 Mason, 397; *Townsend v. McDonald*, 12 N. Y. 381. And see *Frink v. Lawrence*, 20 Conn. 117, 50 Am. Dec. 274; *Springfield v. Harris*, 4 Allen, 494, 81 Am. Dec. 715; *Elliot v. Fitchburg R. Co.*, 10 Cush. 191, 57 Am. Dec. 85.

² *Russell v. Napier*, 80 Ga. 77, 4 S. E. Rep. 857; *Stallard v. Cushing*, 76 Cal. 472, 18 Pac. Rep. 427; *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. Rep. 791; *Nye v. Clark*, 55 Mich. 599, 22 N. W. Rep. 57; *Wilmarth v. Woodcock*, 66 Mich. 331, 33 N. W. Rep. 400; *Morgan v. Meuth*, 60 Mich. 238, 27 N.

W. Rep. 509; *Applegate v. Morse*, 7 Lans. 59; *Avery v. New York Cent. & H. River R. Co.*, 106 N. Y. 142, 12 N. E. Rep. 619; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. Rep. 67; *Gerrish v. Shattuck*, 128 Mass. 571; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Webber v. Gage*, 39 N. H. 182; *Smith v. Young*, 160 Ill. 163, 43 N. E. Rep. 486; *McCann v. Day*, 57 Ill. 101; *Newell v. Sass*, 142 Ill. 104, 31 N. E. Rep. 176; *Turpin v. Dennis*, 139 Ill. 274, 28 N. E. Rep. 1065; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. Rep. 111; *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. Rep. 717; *Lockwood Co. v. Lawrence*, 77 Me. 297, 312. See § 724.

unmolested; nor can it, by removing the cause, prevent the necessity for multiplied litigation.”¹

In an action to restrain the obstruction of a right of way the plaintiff should show in his statement of claim whether he claims the right by prescription or by grant. He ought also to show with reasonable certainty the extent of the way claimed and its course.² His bill must set forth or furnish the means of ascertaining exactly what the easement of way is and the precise locality which it occupies with its shape and dimensions. An encroachment upon a way will not be enjoined where the proofs show nothing but an oral agreement for its establishment, and show such occasional variations in its location and bounds as to make it impossible to determine where it originally existed.³

881. An injunction is the appropriate remedy for one who suffers injury from an unlawful use or invasion of a water-course, if the injury is, from the nature of the case, a continuing one. The remedy at law would be wholly inadequate, because a succession of actions would be necessary. The test for determining whether an injunction is the appropriate remedy is found in the nature of the injury. “If it be permanent, or such as will continue to operate in all future time, then the proceeding can be sustained;” but if it be only temporary, as where the water has overflowed from a pond from some unusual cause which is not likely to be operative again, an injunction cannot be sustained because an action at law would be an adequate remedy.⁴ When an invasion of a right in the use of a water-course “is threatened and intended, which is necessarily to be continuing and operative prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is not only permissible, but is the

¹ *Nininger v. Norwood*, 72 Ala. 277, 281, per Brickell, C. J.

² *Harris v. Jenkins*, 22 Ch. D. 481.

³ *Fox v. Pierce*, 50 Mich. 500, 15 N. W. Rep. 880; *Vanwinkle v. Curtis*, 3 N. J. Eq. 422.

⁴ *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50, per Dixon, C. J.; *Schmitzius v. Bailey* (N. J.), 32 Atl. Rep. 219; *Davis v. Londgreen*, 8 Neb. 43; *Hicks v. Silliman*, 93 Ill. 255, 264; *Rigney v. Tacoma Light & W. Co.*, 9 Wash. 576, 26 L. R. A. 425; *Brooks v.*

Cedar Brook R. Improvement Co., 82 Me. 17, 7 L. R. A. 460, 19 Atl. Rep. 87; *Wallace v. Drew*, 57 Barb. 413; *Farris v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24; *Cherry v. Stein*, 11 Md. 1; *Proprietors of Mills v. Braintree Water Supply Co.*, 149 Mass. 478, 21 N. E. Rep. 761, 4 L. R. A. 272; *Hahn v. Thornberry*, 7 Bush. 403; *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247; *Haines v. Hall*, 17 Oreg. 165, 20 Pac. Rep. 831, 3 L. R. A. 609.

most appropriate means of remedy. It affords, in fact, the only adequate and sure remedy. For the very doubtfulness as to the extent of the prospective injury, and the impossibility of ascertaining the measure of just reparation, render such injury irreparable, in the sense of the law relating to this subject."¹

882. In case the injury complained of is the pollution of a stream, an injunction will be issued almost as a matter of course.² Vice-Chancellor Kindersley, in such a case, said: "The plaintiffs, the parties so injured, I conceive, have, as a general rule, a right to come to the court of equity and say, 'Do not put us to bring action after action for the purpose of recovering damages, but interpose by a strong hand, and prevent the continuance of those acts altogether, in order that our legal right may be protected and secured to us.'"³ In a recent case in Massachusetts relating to the pollution of a stream, the court say: "The defendant contends that, according to general principles of the common law, the plaintiff has a complete remedy upon the facts alleged by him, and that he should be compelled to resort to his action at law before seeking relief in equity. But it is quite clear that a bill in equity may be maintained by a riparian owner to restrain another from polluting the stream to the plaintiff's material injury."⁴

An action for the pollution of the water of a stream probably lies immediately upon the sending of the offensive or deleterious matter into the stream.⁵

883. A court of equity will restrain an interference with the enjoyment of an easement, though this has not been established at law, if it appears to be a clear and certain right, and that an injurious interruption of that right is threatened.⁶ Thus, if one has for a long time enjoyed the use of a water-course, and is in the actual possession of the right, though he has not established his right at law, a court of equity may issue an injunction to prevent a division

¹ Lyon v. McLaughlin, 32 Vt. 423. 425, per Barrett, J.

² Clowes v. Staffordshire Potteries W. Co., L. R. 8 Ch. 125; Harris v. Mackintosh, 133 Mass. 228; Woodward v. Worcester, 121 Mass. 245; Merrifield v. Lombard, 13 Allen, 16, 90 Am. Dec. 172.

³ Wood v. Sutcliffe, 21 L. J. Ch. 253, 255.

⁴ Harris v. Mackintosh, 133 Mass. 228.

⁵ Goldsmid v. Turnbridge Wells Imp. Com'rs, L. R. 1 Eq. 161.

⁶ Goodhart v. Hyett, 25 Ch. D. 182; Lockwood Co. v. Lawrence, 77 Me. 297, 314; Gardner v. Newburgh, 2 Johns. Ch. 162; Ballou v. Hopkinton, 4 Gray, 324, 328.

or obstruction of it to his injury. Chancellor Kent, so holding,¹ cites two early cases on this very subject of diverting water-courses,² and says: "These cases show the ancient and established jurisdiction of this court; and the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, upon just and equitable grounds, ought to be prevented."

The rule was formerly quite general, however, that to authorize the interference of a court of equity by injunction to prevent an interference with an easement, the right should first be established at law.³ It is said that prior to Lord Eldon's time injunctions were rarely issued; and at a much later date injunctions were rarely issued in cases of private nuisance until the right had been established in a suit at law. "But now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error, to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one."⁴

884. The plaintiff is not entitled to the remedy by injunction unless his right is clear, in case it has not been established at law, as where the right is denied by the defendant in his answer, and is questioned or made doubtful by the proofs in the case. "In a case so situated the plaintiff should first establish his right in an action at law, and then come into chancery, if necessarily, for the protection of the legally established right. Where the emergency is pressing, and the injunction affidavits disclose a *prima facie* right in the plaintiff, the proper practice, I apprehend, is for the court to interfere by special injunction, and stay the defendant's hand until the right has been tried at law. If the plaintiff will not bring his

¹ Gardner v. Newburgh, 2 Johns. Ch. 162.

³ Bush v. Western, Prec. in Ch. 530; and Finch v. Resbridger, 2 Vern. 390.

² Weller v. Smeaton, 1 Cox, 102; Bliss v. Kennedy, 43 Ill. 67, 72.

⁴ Campbell v. Seaman, 63 N. Y. 568, 582, per Earl, J.

suit at law within a reasonable time, or fails to maintain it, the special injunction can be dissolved. But if without unreasonable delay he succeeds in establishing his right, the defendant can then be heard on his answer and proofs, and the injunction be dissolved or made perpetual as may appear equitable and just.”¹

An interference with an easement will be restrained by injunction if the right is itself certain, and the violation of it, or a threatened violation of it, is clearly shown.² If the evidence is conflicting and the injury doubtful this remedy will be withheld.³ The nature of the injury is, however, more to be considered than the magnitude of it.⁴

Interference with the enjoyment of an easement will be enjoined upon a final hearing; but a preliminary injunction will not issue where the complainant's right depends upon an unsettled question of law.⁵

885. Courts of equity will not enjoin the obstruction of an easement in case the threatened injury is only slight, or is so slight that it may be compensated for by a small amount of damages. It is only where substantial damages would be given at law that a court of equity will interfere by injunction.⁶ Thus, where the obstruction complained of is the interception of light, the question is not what amount of light is intercepted, but whether the light is so obstructed as to cause material inconvenience to the plaintiff and to cause material damage to his building by the lessening of its value.

¹ Rhea v. Forsyth, 37 Pa. St. 503, 507, 78 Am. Dec. 441, per Woodward, J.

² Fox v. Pierce, 50 Mich. 500, 15 N. W. Rep. 880; Olmsted v. Loomis, 6 Barb. 152.

³ Parker v. Winnipiseogee Lake C. & W. Co., 2 Black. 545.

⁴ Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579; Davis v. Londgreen, 8 Neb. 43.

⁵ Dana v. Valentine, 5 Met. 8; Ingraham v. Dunnell, 5 Met. 118; Pennsylvania R. Co. v. National Docks, etc., Ry. Co. (N. J. L.), 32 Atl. Rep. 220; Citizens' Coach Co. v. Camden Horse R. Co., 29 N. J. Eq. 299, 33 N. J. Eq. 267, 36 Am. Rep. 542; Hagerty v. Lee, 45 N. J. Eq. 255, 17 Atl. Rep. 826; Lord v. Carbon Iron Manuf. Co., 38 N. J.

Eq. 452; Welsh v. Taylor, 2 N. Y. Supp. 815; Longendyck v. Anderson, 59 How. Pr. 1.

⁶ Fletcher v. Bealey, 28 Ch. D. 688; Clarke v. Clark, L. R. 1 Ch. 16; Robson v. Whittingham, L. R. 1 Ch. 442; Lanfranchi v. MacKenzie, L. R. 4 Eq. 421; Dent v. Auction Mart Co., L. R. 2 Eq. 238; Yates v. Jack, L. R. 1 Ch. 295; Martin v. Headon, L. R. 2 Eq. 425; Sutton v. Montfort, 4 Sim. 559; Wynstanly v. Lee, 2 Swanst. 330; Attorney-General v. Nichol, 16 Ves. 337, per Lord Eldon. And see Chastey v. Ackland [1895], 2 Ch. 389; Clawson v. Primrose, 4 Del. Ch. 643; Hulley v. Security Trust Co., 5 Del. Ch. 578; Greer v. VanMeter (N. J. Eq.), 33 Atl. Rep. 794.

“It is necessary, in order that an injunction should be granted, for the plaintiff to show that there will be a permanent obstruction to the access of light, to such an extent as to render the occupation of his house less comfortable than it was before, or to prevent the present tenant from carrying on his business as beneficially as he could before, or that the plaintiff, as the owner of the reversion, will suffer substantial or material damage by the lessening of its value.”¹

If a riparian owner diverts water from the stream, but restores it without substantial diminution or deterioration before it reaches the land of his neighbor below, no injunction can be obtained for the diversion. Lord Cottenham in such a case said: “Now the plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendants as would have entitled him to a verdict at law in an action for damages. In the manufacturing districts, where there are as many mills along a stream as the water will supply, it would be extremely hard that a proprietor of one of such mills might not divert the stream within his own land restoring it to its ancient channel before it entered into the lands of his neighbor without a diminution of the usual quantity. In such cases, and in the similar case of alleged obstruction to the use of light, in order to sustain an injunction, there must be both an unwarrantable use and an injury resulting from such use.”²

The diversion or obstruction of a natural stream of water will not be enjoined at the suit of a riparian proprietor whose rights are infringed, if he is not making any use of the water at the time, but allows the water to flow by unutilized. In such a case a court of equity will use its discretion not to interfere by injunction, but leave the plaintiff to his remedy at law.³ “The extraordinary process of injunction will be used by the court of chancery only so

¹ *Kino v. Rudkin*, 6 Ch. D. 160, 165, per Fry, J.

² *Elmhirst v. Spencer*, 2 Mac. & G. 45, 50. And see to like effect, *Kensit v. Great Eastern R. Co.*, 23 Ch. D. 566, per Pollock, B.; *Williams v. Morland*, 2 B. & C. 910; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, per Lord Blackburn; *Attorney-General v. Nichol*, 16 Ves. 337, per Lord Eldon; *Sandwich v. Great Northern R. Co.*, 10 Ch. D. 707.

³ § 745; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572; *Garwood v. New York C. & H. Riv. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Webb v. Portland Manuf. Co.*, 3 Sumner, 189, 192; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373, 379; *Corning v. Troy Iron & N. Factory*, 40 N. Y. 191; *West Point Iron Co. v. Reymert*, 45 N. Y. 703.

far as it is necessary to vindicate or enforce valuable rights of parties litigant, and will ordinarily not be allowed, where the injury sought to be restrained is only trivial in its nature."¹

Where one in building a party-wall slightly encroached upon his neighbor's building, so that there was a diminution of the width of it above the second floor, an injunction was denied, on the ground that the injury might be fully compensated by the payment of damages in money.²

886. To authorize an interference by injunction it must appear that the plaintiff's property rights will be violated and that a substantial injury, and not merely a possible injury, will result from such violation.³

The bill must allege facts sufficient to show that the apprehension of injury is well founded,⁴ and that a violation of the plaintiff's rights of property will inevitably follow if the threatened or intended act of the defendant is carried into effect.⁵

A bill in equity to establish a right of drainage by an existing drain through land of another may be maintained, if the right is denied, although the drain has not been actually obstructed or stopped by the owner of such land.⁶

A landowner will not be enjoined from making excavations on his land where no serious injury to the adjoining land is imminent, and there is nothing peculiar in the situation or circumstances of such adjoining land making it liable to injury and requiring the protection of a court of equity.⁷

But such a threatened injury as the removal of lateral support will ordinarily be enjoined, though the damage already done is very slight, if the probable damage, if the defendant goes on with his work, will be very large. The right to an injunction does not depend upon the magnitude of the damage done, or even upon that threatened, so much as upon the nature of the injury. Thus, in a

¹ Ulbricht v. Eufaula Water Co., 86 Ala. 587, 594, 6 So. Rep. 78, 4 L. R. A. 572, per Somerville, J.

² Burton v. Moffitt, 3 Oreg. 29.

³ Goodhart v. Hyett, 25 Ch. D. 182, 190; Taylor v. Brookman, 45 Barb. 106; McMaugh v. Burke, 12 R. S. 499.

⁴ Roman v. Strauss, 10 Md. 89; Amelung v. Seekamp, 9 G. & J. 468.

⁵ Pattisson v. Gilford, L. R. 18 Eq.

262, per Jewell, M. R. And see Fletcher v. Bealey, 28 Ch. D. 688; Goodhart v. Hyett, 25 Ch. D. 182; Haines v. Taylor, 2 Ph. 209; Emperor of Austria v. Day, 3 De G. F. & J. 217; Tipping v. Eckersley, 2 K. & J. 264.

⁶ Jones v. Adams, 162 Mass. 224. See Earley's App. 121 Pa. St. 496, 15 Atl. Rep. 602.

⁷ McMaugh v. Burke, 12 R. I. 499.

case where the defendant had commenced to make an excavation in his land along the line of the plaintiff's land, so that the soil of its own weight had fallen into the excavation, but the damage already done was so slight that the court awarded only five dollars for it, an injunction was granted because the injury threatened was serious.¹

To give equity jurisdiction to enjoin an interference with an easement, it is not necessary that it be absolutely essential to the enjoyment of the estate to which it is appurtenant. That it is highly beneficial and convenient therefor is sufficient.²

887. A city or town cannot be enjoined from interfering with an easement under legislative authority in a valid exercise of the police power of the State; as where land and a stream of water were purchased by a city for the construction of a reservoir to be used for a water supply for the city, and in part consideration for the purchase it was agreed that the former owner should have the right to use the water for boating and fishing, and he having established a pleasure resort on the shore, the water was polluted, and the city, by an ordinance under legislative authority, prohibited the further use of the water in this way; it was held that the owner of the easement could not enjoin the enforcement of the ordinance; and that if he had any remedy, it was to be sought in an action for damages.³

888. A court of equity granting an injunction restraining interference with an easement, may at the same time assess damages already sustained by past interference. The equitable nature of the action is not affected by including such a demand for damages. "When, as in the litigation connected with these elevated railroads, the court proceeds further and fixes the amount of the damage sustained to the fee of the property, which the defendant companies may pay in order to obviate the injunction, it does that which is a matter, not of strict legal right, but of equitable procedure and remedy, and which is resorted to by the court, that the corporation may acquire that legal right to maintain and operate its railroad in front of the complainant's property, which it might have acquired, had it proceeded in the beginning to condemn the property-owner's rights under the law of eminent domain. The

¹ Trowbridge v. True, 52 Conn. 190, 643, 7 N. E. Rep. 111; Newell v. Sass, 52 Am. Rep. 579. 142 Ill. 104, 31 N. E. Rep. 176.

² Smith v. Young, 160 Ill. 163, 43 N. E. Rep. 486; Cihak v. Klekr, 117 Ill. 378, 11 Atl. Rep. 354. ³ Dunham v. New Britain, 55 Conn.

controlling idea, in the assumption by a court of equity of the authority to make a complete decree in such cases, which shall finally settle the respective rights and obligations of the parties, is, plainly, that all the parties are before it, and that its decree will be effectual because operating upon all the parties who have any interest in the subject-matter of the litigation.”¹

II. *Injunctions for the Removal of Obstructions.*

889. A mandatory and perpetual injunction may issue for the removal of obstructions to rights of way or to other rights appurtenant to land.² But the court will not in every case of a permanent obstruction to the use of an easement restore the aggrieved party to his former situation. “Each case depends on its own circumstances. It is for the court, in the exercise of a sound discretion, to determine in such instances whether a mandatory injunction shall issue. It will not be issued when it appears that it will operate inequitably and oppressively, nor when it appears that there has been unreasonable delay by the party seeking it in the enforcement of his rights, nor when the injury complained of is not serious or substantial, and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject the other party to great inconvenience and loss.”³

A grantor who obstructs a street, the use of which he has impliedly granted by conveying land by a map or plan showing such street,

¹ Pegram v. N. Y. Elev. R. Co., 147 N. Y. 135, 144, per Gray, J.

² Boland v. St. John's Schools, 163 Mass. 229, 39 N. E. Rep. 1035; Nash v. New England L. Ins. Co., 127 Mass. 91, 97; Creely v. Bay State Brick Co., 103 Mass. 514; Cadigan v. Brown, 120 Mass. 493; Gurney v. Ford, 2 Allen, 576.

³ Starkie v. Richmond, 155 Mass. 188, 195, 29 N. E. Rep. 770, per Morton, J. And see Royal Bank v. Grand Junction R. Co., 125 Mass. 490; Gaskin v. Balls, 13 Ch. Div. 324; Aynsley v. Glover, L. R. 18 Eq. 544, L. R. 10 Ch. 283; Lewis v. Chapman, 3 Beav. 133; Dent v. Auction Mart Co., L. R. 2 Eq. 238, 246, 255; Krehl v. Burrell, 7 Ch. D. 551, 11 Ch. D. 146, 10 Eng. Rul. Cas. 307;

Dexter v. Beard, 7 N. Y. Supp. 11; De Witt v. Van Schoyk, 110 N. Y. 7, 17 N. E. Rep. 425; Davis v. Lambertson, 56 Barb. 480; Williams v. New York Cent. R. Co., 16 N. Y. 97, 111, 69 Am. Dec. 651; Avery v. New York Cent. & H. Riv. R. Co., 106 N. Y. 142, 12 N. E. Rep. 619; McBryde v. Sayre, 86 Ala. 458, 5 So. Rep. 791; Gardner v. Stroever, 81 Cal. 148, 22 Pac. Rep. 483, 6 L. R. A. 90; Nicholson v. Getchell, 96 Cal. 394, 31 Pac. Rep. 265; Brauns v. Glesige, 130 Ind. 167, 29 N. E. Rep. 1061; Kelly v. Dunning, 43 N. J. Eq. 62, 71, 10 Atl. Rep. 276; Troe v. Larson, 84 Iowa, 649, 35 Am. St. Rep. 336; Wharton v. Stevens, 84 Iowa, 107, 35 Am. St. Rep. 296.

may be compelled by a mandatory injunction to remove the obstruction.¹

Incidentally to the award of that relief, the complainant's legal right must and properly will be determined and declared in the same court.²

Where one having an easement of way stands by while a railroad company, without knowledge of the right, erects an expensive embankment over the location of the way, he will not be allowed a decree for the abatement of the obstruction until the railroad company shall have a reasonable opportunity to condemn the right of way belonging to the complainant.³

890. A mandatory injunction for the removal of an obstruction after the work has been done may be had if the defendant has gone on after notice and without right, in a wilful invasion of the plaintiff's rights, unless the removal of the erection would cause a damage to the defendant disproportionate to the injury to the plaintiff; in which case the court will leave the plaintiff to his remedy at law.⁴ "When a plaintiff brings a bill to prevent a continuing trespass or a permanent injury to his real estate, the question whether he shall have a prohibitory injunction, or, if the work affecting the property has been done, a mandatory injunction requiring the restoration of the estate to its former condition, depends on a consideration of all the equities between the parties. In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has changed the condition of his

¹ *White v. Tide Water Oil Co.*, 50 N. J. Eq. 1, 25 Atl. Rep. 199; *Gawtry v. Leland*, 40 N. J. Eq. 323; *Dill v. Board of Education*, 47 N. J. Eq. 421, 21 Atl. Rep. 739; *Rogers Locomotive & Mach. Works v. Erie Ry. Co.*, 20 N. J. Eq. 379; *Oshkosh v. Milwaukee & L. W. R. Co.*, 74 Wis. 534, 17 Am. St. Rep. 175; *Eau Claire v. Matzke*, 86 Wis. 291, 39 Am. St. 900.

² *White v. Tide Water Oil Co.*, 50 N. J. Eq. 1, 25 Atl. Rep. 199; *Gawtry v. Leland*, 40 N. J. Eq. 323; *Lehigh Zinc & Iron Co. v. Trotter*, 43 N. J. Eq. 185, 7 Atl. Rep. 650, and 10 Atl. Rep. 607; *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl.

Rep. 865; *Dill v. Board*, 74 N. J. Eq. 421, 20 Atl. Rep. 739.

³ *Manning v. Port Reading R. Co.* (N. J. Eq.), 33 Atl. Rep. 802.

⁴ *Krehl v. Burrell*, 7 Ch. D. 551, 10 Eng. Rul. Cas. 307; *Lynch v. Union Inst. for Savings*, 159 Mass. 306; *Knowlton, J.*, citing *Low v. Innes*, 4 De G. J. & S. 286; *Aynsley v. Glover*, L. R. 18 Eq. 544; *Hunter v. Carroll*, 64 N. H. 572, 15 Atl. Rep. 17; *Ford v. Knapp*, 102 N. Y. 135, 6 N. E. Rep. 283; *Thomas v. Evans*, 105 N. Y. 601, 12 N. E. Rep. 571; *Carpenter v. Gold*, 88 Va. 551, 14 S. E. Rep. 329.

real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay the damages. In such case the plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay the damages in money than to restore the property.”¹

In a case in England, where an injunction was prayed for to prevent the erection of a building which would interfere with the plaintiff's ancient lights, the defendant gave an undertaking to pull his building down if ordered, and he was allowed to continue the erection of it. At the trial the plaintiff established his right, and the court ordered the removal of the building, although this was valued at six thousand pounds, while the injury to the plaintiff was valued at only six hundred pounds.² The court, in giving judgment, referred to a case in which Jessel, Master of the Rolls, made these observations: “If with notice of the right belonging to the plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the court, ‘You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right’ — of course, that simply means that the court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. It appears to me that it never could have been intended by the legislature to bring such a result about.”³

¹ *Lynch v. Union Institution for Savings*, 159 Mass. 306, 308, per Knowlton, J., citing *Lynch v. Union Inst. for Savings*, 158 Mass. 394, 33 N. E. Rep. 603; *Tucker v. Howard*, 128 Mass. 361, 122 Mass. 529; *Attorney-General v. Algonquin Club*, 153 Mass. 447, 27 N. E. Rep. 2. And see *London Brewery Co. v. Tennant*, L. R. 9 Ch. 212; *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355, 360; *Aynsley v. Glover*, L. R. 18 Eq. 544, 553; *National Prov. Plate Glass Ins. Co. v. Prudential Ass. Co.*, 6 Ch. D. 757, 761; *Wheeler v. Black*, 14 Canada S. C. 242.

² *Greenwood v. Hornsey*, 33 Ch. D. 471.

³ *Krehl v. Burrell*, 7 Ch. D. 551, 554, 10 Eng. Rul. Cas. 307, 310. The legislation referred to is Lord Cairn's Act, 21 & 22 Vict., c. 27, § 2, by which discretion is given to the court to award damages in substitution for an injunction in the case of a substantial interference with a plaintiff's ancient lights. This act was repealed by 46 & 47 Vict., c. 49, but it is said that it is a common practice since the Judicature Acts to claim damages as an alternative remedy for an injunction. *Goddard on Easements* (5th ed.) 436.

A court of equity will not compel one whose right in a passage-way has been encroached upon by the erection of a wall of a building within it to his substantial injury, to sell his right at a valuation, but will compel the party so encroaching to restore the premises, as nearly as may be to their original condition, if he has had notice of the plaintiff's claim.¹

III. *Abatement of Obstructions.*

891. Another remedy for the removal of an obstruction to an easement is abatement by the party injured. "Whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it. If a house or wall is erected so near to mine that it stops my ancient lights, which is a private nuisance, I may enter my neighbor's land and peaceably pull it down. Or, if a new gate be erected across the public highway, which is a common nuisance, any of the king's subjects passing that way may cut it down and destroy it. And the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy, such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice."²

Although the court may have refused a mandatory injunction for the removal of a house which obstructed a right of way, if the right of way is established, the party entitled to it may assert the right at common law, and may, after notice and request to remove the obstructing house, pull it down, although it is actually inhabited; and under such circumstances a court of equity will grant leave to the party entitled to the way, notwithstanding the servient estate is in the hands of a receiver, to pursue any remedies, or to do any acts he can lawfully take or do to abate the obstruction.³ The court, in granting the order in such case, said that the party asking leave to pull the house down must proceed at his own risk, just as if he had not obtained the order, for the order merely allows him to pursue whatever remedy the law gives him in a lawful manner; but no sanction or authority is conferred by the order.⁴

¹ Tucker v. Howard, 128 Mass. 361,
122 Mass. 529.

² 3 Bl. Com. 5.

³ Lane v. Capsey [1891], 3 Ch. 411;
Davies v. Williams, 16 Q. B. 546.

⁴ Lane v. Capsey [1891], 3 Ch. 411.

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